DOCKET

No. 87-1979-CSX
Status: GRANTED

Title: Chesapeake and Ohio Railway Company, Petitioner
v.
Nancy J. Schwalb and William McGlone

Docketed:
June 2, 1988

Court: Supreme Court of Virginia

Counsel for petitioner: Prince,William T.

Vide:
88-127

Counsel for respondent: Thompson,C. Gerard

See also:
88-127

Entry	Date	Note	Proceedings and Orders
1	Jun 2 1988	G	Petition for writ of certiorari filed.
2	Jul 2 1988		Brief of respondents in opposition filed.
4	Jul 5 1988		Brief amici curiae of. Assn. of American Railroads, et al. filed.
3	Jul 6 1988		DISTRIBUTED. September 26, 1988
5	Oct 3 1988	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
7	Jan 9 1989		Brief amicus curiae of United States filed. VIDED.
6	Jan 11 1989		REDISTRIBUTED. February 17, 1989
8	Feb 21 1989		Petition GRANTED. The case is consolidated with 88-127, and a total of one hour is allotted for oral argument.
			**
10	Mar 25 1989		Order extending time to file brief of petitioner on the merits until April 22, 1989.
11	Apr 21 1989	G	Motion of Association of American Railroads, et al. for leave to file a brief as amici curiae filed.
12	Apr 21 1989		Brief amicus curiae of United States filed. VIDED.
13	Apr 21 1989		Joint appendix filed. VIDED.
14	Apr 21 1989		Brief of petitioner Chesapeake & Ohio Railway Co. filed. VIDED.
15	May 1 1989		Motion of Association of American Railroads, et al. for leave to file a brief as amici curiae GRANTED.
16	May 5 1989	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	May 11 1989		Record filed.
		*	Certified copy of original record, box, received.
18	May 22 1989		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
19	May 24 1989		Brief of respondents filed.
20	Jun 5 1989	D	Motion of respondents for divided argument filed.
21	Jun 12 1989		Motion of respondents for divided argument DENIED.
22	Jun 23 1989		Reply brief of petitioners Chesapeake & Ohio Railway Co. filed. VIDED.
23	Jul 12 1989		CIRCULATED.
24	Jul 20 1989		SET FOR ARGUMENT TUESDAY, OCTOBER 3, 1989. (3RD CASE)
25	Jul 21 1989	G	Motion of the Solicitor General to permit Christine Desan Husson, Esq. to present oral argument pro hac vice filed.

No. 87-1979-CSX

Entry	Date	Note	Proceedings and Orders
26	Sep 20 1989		Lodging received. (See 88-127).
27	Sep 25 1989		Motion of the Solicitor General to permit Christine Desan Husson, Esq. to present oral argument pro hac vice GRANTED.
28	Oct 3 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

1

Docket No. 87 1979

Supreme Court, U.S.
FILED
JUN 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1987

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

V.

NANCY J. SCHWALB and WILLIAM McGLONE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

William T. Prince
John Y. Richardson, Jr.
Joan F. Martin
WILLIAMS WORRELL KELLY
AND GREER, P.C.
600 Crestar Bank
Norfolk, Virginia 23510
804-624-2600

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether mechanical laborers who clean and maintain coal loading machinery at a maritime situs fulfill the status requirement of the Longshore and Harbor Workers' Compensation Act?

II. Whether a state court's adherence to a narrow definition of LHWCA status, despite uniform federal precedent to the contrary, effectuates the intent of Congress to create a simple uniform standard of coverage?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED....................i

TABLE OF AUTHORITIES.................iii

OPINIONS BELOW..........................3

JURISDICTION............................3

STATUTE INVOLVED........................4

STATEMENT OF THE CASE...................4

Factual Summary...................8

Raising the Federal Question.....11

ARGUMENT...............................14

I. McGlone and Schwalb are Maritime Employees..............17

II. The Schwalb-McGlone Decision Offends the Congressional Goal of a Uniform Standard.......35

CONCLUSION.............................40

CERTIFICATE OF SERVICE.................41

TABLE OF AUTHORITIES

Page

Cases

Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. 1982)................30,31

Bradshaw v. McCarthy, 3 BRBS 195 (1976), petition for review denied, 547 F.2d 1161 (3d Cir. 1977)................23,24

Chesapeake & Ohio Railway v. Martin, 283 U.S. 209 (1931)..............37

Director, OWCP v. Perini North River Assoc., 459 U.S. 297 (1983)..................14,15,20,21

England v. Louisiana State Medical Examiners, 375 U.S. 411 (1964)...........36,37

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972)..............31

Garvey Grain Co. v. Director, Office of Workers'Compensation Programs, 639 F.2d 366 (7th Cir. 1981)...............27,28

Goode v. Norfolk & Western Railway, No. L-86-335 (Norfolk Circuit Court, Dec. 17, 1986).........25,32

Harman v. Forssenius, 380 U.S.

Page

528 (1965)........................37

Harmon v. Baltimore & Ohio Railroad,
741 F.2d 1398
(D.C. Cir. 1984)..............24,25

Herb's Welding, Inc. v. Gray,
470 U.S. 414 (1985)...........25,26

Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750
(5th Cir. 1981), *cert. denied*,
454 U.S. 1163
(1982)....................27,30,35

Jacksonville Shipyards, Inc. v. Perdue,
539 F.2d 533 (5th Cir. 1976),
vacated and remanded,
433 U.S. 904 (1977)..............29

Levins v. Benefits Review Board,
724 F.2d 4 (1st Cir.
1984)............................33

Newport News Shipbuilding & Dry Dock Co. v. Graham,
573 F.2d 167 (4th Cir.),
cert. denied,
439 U.S. 979 (1978)..............23

Noqueira v. New York, N.H. & H.R. Co.,
281 U.S. 128 (1930)...........17,18

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249
(1977)...........15,17,18,19,20,22
....................23,28,31,33,38

Page

Pennsylvania R. Co. v. O'Rourke,
344 U.S. 334 (1953)..............18

P.C. Pfeiffer Co. v. Ford,
444 U.S. 69 (1979).........19,20,24
..........................28,36,38

Price v. Norfolk & Western Railway,
618 F.2d 1059
(4th Cir. 1980)............12,13,22
..........................23,33,34

Prolerized New England Co. v. Benefits Review Board,
637 F.2d 30 (1st Cir. 1980),
cert. *denied*,
452 U.S. 938 (1981)..............28

Seaboard System Railroad, Inc. v. Caldwell, Record No. 870490
(Va. Sup. Ct.)...................39

Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs, 685 F.2d 1121
(9th Cir. 1982)...............26,30

Southern Pacific Co. v. Jensen
244 U.S. 205 (1917)..............14

Turnista v. Chesapeake & Ohio Railway,
No. 8690-WS (Newport News Circuit
Court, May 21, 1984)..........31,32

Western Air Lines v. Board of Equalization, 480 U.S. ___, 94
L.Ed 2d 112 (1987)...............36

Page

Weyerhaeuser Co. v. Gilmore,
528 F.2d 957 (9th Cir.),
cert. denied,
429 U.S. 868 (1976)...........29,30

White v. Norfolk & Western Railway,
217 Va. 832, 232 S.E.2d 807,
cert. denied,
434 U.S. 860
(1977)..............12,13,14,23,28
....................29,31,32,33,34

STATUTES

28 U.S.C. § 1257(3)....................3

33 U.S.C. § 901 *et seq*.................8

33 U.S.C. § 902 (3).................4,33

33 U.S.C. § 902(4)...................15

33 U.S.C. § 905(a)....................4

33 U.S.C. § 920(a)...................21

45 U.S.C. § 51 *et seq*............4,8,11

Va. Code § 8.01-265
(1950 as amended)..................39

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. __________

CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

v.

NANCY J. SCHWALB,

Respondent.

CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

v.

WILLIAM McGLONE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, Chesapeake and Ohio Railway Company,[1] respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of Virginia in two cases presenting the identical legal question based on similar facts.

---

[1] Pursuant to Rule 28.1 petitioner states as follows: Chesapeake and Ohio Railway Co. was merged into CSX Transportation, Inc. on Sept. 2, 1987 and the surviving corporation under the name of CSX Transportation, Inc. succeeded to the ownership of the property of the Chesapeake and Ohio Railway Co. CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation and has the following subsidiaries (except wholly - owned): Alleghany and Western Railroad Co., Augusta and Summerville Railroad Co., Beaver Street Tower Co., Central Transfer Railway and Storage Co., Chatham Terminal Co., Clearfield and Mahoning Railway Co., Dayton and Michigan Railroad Co., Dayton and Union Railroad Co., Fruit Growers Express Co., The Home Avenue Railroad Co., North Charleston Terminal Co., Paducah & Illinois Railroad Co., The Baltimore and Cumberland Valley Railroad Extension Co., Winston-Salem Southbound Railway Co., Woodstock & Blocton Railway Co., Richmond - Washington Co. and Richmond, Fredericksburg and Potomac Railroad Co.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia in these consolidated cases, which is not yet reported, is reprinted in the appendix at 1A-18A. The judgments, entered March 4, 1988, are reprinted at 35A-38A. The letter opinion of Judge Smith, Circuit Court of the City of Newport News, in Schwalb v. Chesapeake and Ohio Railway, is reprinted at 19A-21A. The letter opinion of Judge Schlitz, Circuit Court of the City of Portsmouth, in McGlone v. Chesapeake and Ohio Railway, is reprinted at 22A-30A. The trial court judgments appear at 31A-34A.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOLVED

These cases involve specifically the application of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 902(3) and 905(a). The text of these subsections is reprinted at 39A-43A. These cases also involve the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq*.

STATEMENT OF THE CASE

Hampton Roads, upon which the Virginia maritime ports of Newport News, Hampton and Norfolk are located, is the largest natural harbor in the world. It is located at the mouth of the Chesapeake Bay and the mouths of the historic James, Nansemond and Elizabeth Rivers. Since 1607, when English colonists landed at Cape Henry (which is located in what is now Virginia Beach) and proceeded up the James to settle at Jamestown, Hampton Roads has been a global center of maritime commerce. Vessels destined for or arriving from all major foreign and domestic ports are loaded and unloaded at the numerous terminals which handle all types and forms of cargo including the most sophisticated forms of containers. All major terminals are served by rail and trucking concerns. The highway system which serves Hampton Roads includes tunnels which cross the Chesapeake Bay, Hampton Roads, Elizabeth River and soon the James River.

This area has also been a primary center for our nation's naval defenses. Fort Monroe, in Hampton, is the site of the first fortifications built by English-speaking people in

North America and has been continuously occupied since it was built in 1609. Major naval conflicts occurred in Hampton Roads during the Revolutionary War, the War of 1812 and the Civil War. Today it remains the site of the world's greatest concentration of permanent naval installations including the largest naval base in the free world. It is also headquarters for more than twenty major commands including NATO's Supreme Allied Command Atlantic.

Since precolonial times Hampton Roads has also been the site of major shipbuilding and repair concerns; both government and private. Norfolk Naval Shipyard in Portsmouth, built in 1767, is the location of the oldest drydock in the Western Hemisphere. It has built some of the most famous ships in our naval history including the first aircraft carrier. Newport News is home for one of the world's leading shipbuilding and repair companies. There are also numerous shipbuilding and repair facilities located throughout this area.

On the James River in Newport News, Virginia the petitioner, Chesapeake and Ohio Railway Company, operates a coal loading facility where a mechanical conveyor belt system transports coal from railroad cars to colliers berthed at the piers. Petitioner employs mechanical laborers, like respondents Schwalb and McGlone, to clean and maintain daily the loading machines and conveyor belts. This case involves the demarcation of "maritime employment" under the Longshore and

Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq. to the exclusion of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 et seq.

FACTUAL SUMMARY

Coal arrives at the Newport News facility in railroad hopper cars, which act as temporary storage containers until this cargo is loaded onto the waiting vessels. The coal loading begins when a coal car is released to roll down an incline towards a mechanical dumper. From the dumper the coal travels by way of conveyor belts which carry the coal to the loading tower and onto one of two boom belts from which it drops through a chute into the hold of the ship. Barring mechanical problems, the coal moves continuously from the dumper into the ship by machines and gravity.

The dumper is attached at each end to trunnion rollers, which permit the mechanical rotation of the suspended coal car above the hopper. As cars are rotated for dumping some coal spills out into the rollers. Similarly, as the coal progresses along the conveyor belts, some coal unavoidably falls below the belts. Consequently, an essential part of the coal loading process is retrieving this stray coal, sometimes called "trash coal" by the workers, from the trunnion rollers and belts to avoid obstruction of the process. Due to the strictures of the relevant trades' bargaining agreements, the coal that is retrieved from the machinery by mechanical laborers is put back onto the conveyor belt by laborers from another department. [Schwalb T. at 18; McGlone T. at 25]

Both Schwalb and McGlone worked as mechanical laborers at the Newport News facility. The primary responsibility of these workers was to keep the spilled coal from clogging the trunnion rollers or impeding the progress of the belts. [Schwalb T. at 8; McGlone T. at 15] On the day of his accident, respondent McGlone reported to the dumper to remove an accumulation of coal from between the belts and the ground. [McGlone T. at 19-20] McGlone was injured while using an air hose to blow the coal from beneath the moving conveyor belt. On the day of her accident, respondent Schwalb was reporting to the dumper area to perform a thorough cleaning of the trunnion rollers, since loading had just stopped. [Schwalb T. at 27] Schwalb's injury resulted from a fall on the walkway between the hoppers under the dumpers. Both accidents occurred within 300 feet of the water's edge. [McGlone T. at 30; Schwalb T. at 16, 20]

RAISING THE FEDERAL QUESTION

McGlone and Schwalb, in separate actions brought in the circuit courts for the cities of Portsmouth and Newport News respectively, sought damages for their injuries under the FELA, 45 U.S.C. § 51 et seq. Petitioner entered a plea of special jurisdiction in each action, contending that the court lacked jurisdiction because the plaintiff's sole and exclusive remedy was under the LHWCA. After evidentiary hearings, each trial court sustained the plea and dismissed the FELA action. The single issue decided in each case was whether the injured employee met the LHWCA status test. Acknowledging the "liberal interpretations expressed in decisions by the United States Supreme Court," Judge Smith in the Schwalb case had "no difficulty in determining that the plaintiff's remedy is under the LHWCA." 19A, 21A. Judge Schlitz was particularly troubled by the conflict between the Fourth Circuit Court of Appeals decision, Price v. Norfolk & Western Railway, 618 F.2d 1059 (4th Cir. 1980), and an earlier state court decision, White v. Norfolk & Western Railway, 217 Va. 832, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977). Noting that "White stands alone in contrast to the federal decisions . . . which have declined to follow White and have disagreed with its results," Judge Schlitz chose to follow the federal interpretation of federal law, which placed McGlone's action within the exclusive confines of the LHWCA. See his opinion at 22A, 28A-30A. McGlone and Schwalb appealed these rulings to the Supreme Court of Virginia.

The sole issue considered by the Supreme Court of Virginia on appeal was whether McGlone and Schwalb were statutory employees as defined by the LHWCA. Declining the opportunity to adopt the federal courts' interpretation of the LHWCA status test and specifically rejecting the federal precedent established in Price, the Supreme Court of Virginia reaffirmed its 1977 ruling in White, reversed the judgments dismissing the FELA actions, and remanded the cases for trials on the merits.

ARGUMENT

Congress in the early part of the century attempted unsuccessfully to have the states provide coverage for workers on navigable waters who were injured. In 1917, the Court held that states could not constitutionally provide coverage except in rare circumstances (which became known as the "maritime but local" exception). Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). In 1927, the LHWCA was adopted to provide federal compensation for these maritime workers not otherwise covered by various schemes. The original Act provided for coverage if five conditions were met: (1) employee could not be a master of vessel or a member of a crew of a vessel or a person hired by the vessel to load or unload; (2) an "injury" must occur; (3) employer must be a "maritime employer"; (4) injury must occur on navigable waters (including a drydock); and (5) injury must not be compensable under a state compensation scheme. Director, OWCP v. Perini North River Assoc., 459 U.S. 297, 306-07 (1983). The last condition proved unworkable and in 1972 Congress amended the Act and the requirements of coverage. The 1972 enactment has been consistently interpreted to require basically a two part inquiry: situs and status. Northeast Marine Terminal Co. v. Caputo, 442 U.S. 249, 264-65 (1977). The requisite situs is as defined in 33 U.S.C.§ 902(4) and was a legislative expansion landward of what had been known as the "Jensen line" (a/k/a shoreline). In this matter there is no dispute that the injury occurred on a maritime situs as defined by the Act.

This Court has prescribed judicial standards, consistent with the legislative intent of the 1972 amendments, for determining whether a terminal worker is engaged in maritime employment (the "status" test) for purposes of the LHWCA. During the past decade, the lower federal courts have contributed additional insightful analysis while applying the status test in a variety of factual settings. It is too late in the evolution of the LHWCA status test for the Supreme Court of Virginia to have misapprehended the principles approved by this Court. By denying LHWCA status to McGlone and Schwalb, injured while engaged in work that is an integral part of the coal loading process, the state court has obviously repudiated controlling federal precedent. Such unsanctioned autonomy imperils the advancement of the single, uniform standard of coverage envisioned by Congress and warrants intervention by this Court.

I. McGlone and Schwalb are maritime employees

Determination of a worker's status as a maritime employee within the terms of the LHWCA is controlled by principles established in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). The Court has recognized that railroad employees may be covered under the Act, Nogueira v. New York N.H.

& H.R., Co., 281 U.S. 128, 132 (1930), and also that the FELA can not apply where the LHWCA provides coverage, id. See also Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1952). Congress has seen fit to amend and change the Act numerous times as a result of judicial decisions, however, it has never excluded railroad employees from coverage despite a volume of case law in that vein. In Caputo, the Court found that Blundo, who monitored the stripping of cargo from unloaded containers, was a maritime employee because his job was "an integral part of the unloading process." Id. at 271. By finding coverage for Blundo, who was performing essentially clerical duties at a shoreside loading facility, the Court emphasized that the critical question is the purpose of the work, not the type of work. The Caputo Court also acknowledged that the expansiveness of the 1972 Amendments requires a corresponding expansive reading of the Act by the judiciary. Id. at 268. The Court reaffirmed this approach to the LHWCA status test in P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979). Again focusing on the nature of a worker's general job responsibilities and its relation to the shiploading process, the Pfeiffer Court ruled that two pier workers were maritime employees because they were "engaged in intermediate steps of moving cargo between ship and land transportation." Id. at 83. Observing that union rules can fragment the loading process into several discrete jobs, the Court ruled that maritime status would not be defeated because a worker functioned in only a fraction of the sequence:

> A worker responsible for some portion of that [cargo moving] activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process.

Id. at 82-83. The Pfeiffer Court stressed that extending LHWCA coverage to all workers involved in a portion of the cargo moving process would best effectuate the congressional goal of "a simple, uniform standard of coverage." Id. at 83.

More recently, in Director, OWCP v. Perini North River Assoc., 459 U.S. 297 (1983), the Court had an opportunity to comment on the Caputo and Pfeiffer cases. The Perini Court clarified that the 1972 amendments intended to cover all workers previously covered when injured on navigable waters. 459 U.S. at 315-16. The Court noting it "had no occasion" to determine all the possible activities which might be covered on the "expanded landward situs", 459 U.S. at 318, n.27., nevertheless acknowledged that the Act was to be "liberally construed"[2/] and that the 1972 amendments intended to "extend" coverage and protect "additional" workers, 459 U.S. at 315-16 (quoting legislative history).

The Court of Appeals for the Fourth Circuit has held that an employee whose responsibilities include maintaining and repairing equipment and structures used in loading and unloading

---

[2/] 33 U.S.C. 920(a) provides a legislative presumption that any claim under the LHWCA is within the provisions of the Act.

vessels is engaged in maritime employment within the terms of the LHWCA. In Price v. Norfolk & Western Railway, 618 F.2d 1059 (4th Cir. 1980), the court found that an employee who was injured while painting a tower supporting the conveyor belt system that transported grain to the holds of nearby vessels was a maritime employee required to seek his remedy under the LHWCA. The Price court's finding followed an analysis of the general nature of the plaintiff's job, as required under Caputo. Id. at 1060-61. To reach the conclusion that this worker was a maritime employee, the panel reasoned that:

> (1) the equipment being maintained by the claimant was essential to the loading and unloading of vessels at the port; and
>
> (2) the maintenance and repair of longshoring

> machinery and equipment is an essential to the movement of maritime cargo as the actual loading and unloading of ships.

Id. at 1061. In Price the Fourth Circuit expressly disagreed with the Virginia Supreme Court's pre-Caputo decision in White v. Norfolk & Western Railway, supra.

The Price court relied on its earlier decision, Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), which held that a mechanic injured while oiling shipbuilding machinery had the status of a maritime employee. Both Price and Graham found language persuasive from a Benefits Review Board decision that stated:

> Merely because a waterfront mechanic is not directly

> involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. The maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment.

Bradshaw v. McCarthy, 3 BRBS 195, 198 (1976) (emphasis supplied), petition for review denied, 547 F.2d 1161 (3d Cir. 1977).

In Harmon v. Baltimore & Ohio Railroad, 741 F.2d 1398 (D.C. Cir. 1984), the Court of Appeals for the D. C. Circuit reached the same conclusion with regard to a railroad carpenter who was injured while repairing a hopper through which coal passes during the loading process. Adopting the Pfeiffer standard of coverage for employees "engaged in intermediate steps of moving cargo," the Harmon court reasoned that, since coal-loading equipment is essential to the movement of maritime cargo from railcars to ships, "the repair and maintenance of that equipment must also be considered as an integral part in the loading and unloading of ships." 741 F.2d at 1403-04.[3/]

Although the Court has never specifically addressed the issue of whether such employees are covered it has acknowledged their significance in dicta. In Herb's Welding, Inc., v. Gray, 470 U.S. 406 (1985) the Court refused to extend LHWCA coverage to a

---

[3/] The Virginia Supreme Court in Goode v. Norfolk & Western Railway (Norfolk Circuit Court, Nov. 13, 1986), discussed infra at note 4 and accompanying text, dealt with a factual situation almost identical to Harmon.

welder working on a fixed off-shore drilling platform. They did not specifically reach the issue of situs but noted that the only maritime situs connection this worker had was the fact he may have had to take a boat to get to and from work. 470 U.S. at 427, n. 13. The Court felt the platform was no different than an island. 470 U.S. at 421-22. In language important to this case the Court nevertheless found that the employee's "work had nothing to do with the loading or unloading process, nor [was] there any indication he was even employed in the maintenance of equipment used in such tasks." 470 U.S. at 425.

Other circuits have similarly applied the integral function test in determining that workers who maintain or repair equipment or structures essential to loading vessels are maritime employees for LHWCA purposes. Illustrative cases include Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs, 685 F.2d 1121, 1123 (9th Cir. 1982) (repair and maintenance of equipment necessary to loading ships integral to process, thus "maritime employment" for LHWCA); Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750, 755 (5th Cir. 1981) (maintenance and repair of longshoring equipment and facilities essential and indispensable step in shiploading process), cert. denied, 454 U.S. 1163 (1982); Garvey Grain Co. v. Director, Office of Workers' Compensation Programs, 639 F.2d 366, 370 (7th Cir. 1981) (repair and general maintenance of conveyors and other loading equipment integral part of loading process, conferring LHWCA status on worker performing these tasks); Prolerized New England Co. v. Benefits Review Board, 637 F.2d 30, 37 (1st Cir. 1980) (repair and maintenance of integrated shiploading equipment qualifies as maritime employment for LHWCA), cert. denied, 452 U.S. 938 (1981).

In 1977, without the guidance of Caputo and Pfeiffer, the Supreme Court of Virginia decided that a railroad worker who maintained and repaired loading equipment at the Norfolk coal piers was "not directly involved in the loading of coal." White v. Norfolk & Western Railway, supra, 322 S.E.2d at 833 (emphasis in original). Relying on the fact that plaintiff was "not actually handling any cargo, either manually or mechanically," 217 Va. at 833, and borrowing language from Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir.) ("realistically significant relationship to 'traditional maritime activity'"), cert. denied, 429 U.S. 868 (1976) and Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 539 (5th Cir. 1976) ("directly involved"), vacated and remanded, 433 U.S. 904 (1977), the White court held that the plaintiff was not a maritime employee covered by the LHWCA. 217 Va. at 833. See id. (plaintiff "at least one step removed from a realistically significant relationship" and from "direct involvement" in shiploading). In the decade following White, not one reported court opinion has acknowledged White as persuasive authority. Both the Ninth and Fifth Circuits, relied on by the White court, have found workers who repair and maintain shiploading equipment within the scope of the LHWCA. See, e.g., Sea-Land Services, Inc. and Hullinghorst Industries, Inc., both supra. Furthermore, the Weyerhaeuser opinion is unsubstantial authority for analyzing the status of workers assigned to a commercial pier: the Weyerhaeuser plaintiff who was denied maritime status was a pondman injured while working on a sawmill log pond, not a repairman maintaining shiploading equipment beside a deep water pier. See 528 F.2d at 961 (pondman's work not maritime employment in traditional sense; no "realistically significant relationship" to traditional maritime activity involving navigation and commerce on navigable waters). As pointed out in Boudreaux v. American Workover, Inc., 680 F.2d 1034, 1049 (5th

Cir. 1982), Weyerhaeuser formulated its "significant relationship" status test from Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), which addressed the question of federal admiralty jurisdiction in claims arising from airplane accidents over navigable waters. The holding in Executive Jet does not speak persuasively to the intended reach of federal jurisdiction in the context of maritime employment compensation.

Given the tenuous underpinnings of White, and the subsequent clarification of the LHWCA status test in the federal fora, the lower courts in Virginia implied that they were no longer bound by the pre-Caputo pronouncement of the state's highest court. See, e.g., Letter Opinion by Judge

Stephens in Turnista v. Chesapeake & Ohio Railway (Newport News Circuit Court May 21, 1984) and Letter Opinion by Judge Waters in Goode v. Norfolk & Western Railway (Norfolk Circuit Court, Nov. 13, 1986).[4/] Nevertheless the Supreme Court of Virginia accepted review of Schwalb and McGlone and used these cases to reaffirm the discredited White rationale. In its March 4, 1988 opinion, the Schwalb-McGlone court opined that Congress did not intend the 1972 amendments to "have such pervasive and preclusive effects" as had been attributed to them

---

4/ 60A-75A and 44A-57A respectively. The Goode decision was reviewed on appeal by the Supreme Court of Virginia which, citing its rulings in Schwalb and McGlone, reversed the judgment and remanded for trial on the merits. 58A-59A. The Norfolk and Western Railway will file its petition for a writ of certiorari with respect to the Goode case next month. The Turnista judgment was not appealed.

by, for example, the Fourth Circuit Court of Appeals in its Price opinion. See 12A. Rejecting again the "functional relationship" formula that has, since White, been the linchpin of the LHWCA status test, the Supreme Court of Virginia regressed to an illogical demarcation of coverage (or exclusion) based upon classification or labeling of skills where "workers who perform purely clerical tasks"[5/] are indistinguishable from workers who perform

---

[5/] The court's passing reference to clerks is unfortunate and unsupported by the controlling case law. The Court has recognized performance of "clerical" duties does not render LHWCA coverage inapplicable. Blundo, in Caputo, was in reality a pier clerk. See also Levins v. Benefits Review Board, 724 F.2d 4 (1st Cir. 1984) (improper to assume categorically that clerks are not entitled to coverage.) Congress has also specifically excluded some clerical employees from coverage who are covered by state workmen's compensation statutes. 33 U.S.C. § 902(3) reprinted at 39A.

maintenance tasks "such as painting" (a clear reference to Price). 16A-17A. The court recast its status test in terms of an "essential elements" standard, which it described as "more nearly akin to the 'significant relationship' standard [it] adopted in White than the 'overall process' construction invoked by the defendant." 16A. Thus clothed in confusing semantics, the Schwalb-McGlone court prestidigitated pierside maintenance laborers, who manually moved coal during the loading process, into non-covered workers who "perform[ed] purely housekeeping and janitorial tasks." 17A. The Supreme Court of Virginia seems to ignore that all forms of work, regardless of location or employer, have types of skills which may be universal. A ship carpenter may have the same basic training and expertise as a residential carpenter. A longshoreman may employ the same physical tools as those used by a loading dock employee. The critical inquiry is the purpose of the work: to build ships not houses; to move maritime cargo not truck stock. See Hullinghorst Industries, Inc. v. Carroll, supra, 650 F.2d at 756 ("nonmaritime" skills applied to maritime project are maritime).

Without apology, the Schwalb-McGlone court has ignored a decade of case law and it's decision to deny Schwalb and McGlone the status of maritime employees is untenable and must be corrected.

II. The Schwalb-McGlone decision offends the congressional goal of a uniform standard

The Schwalb-McGlone court, in disdaining the federal courts' uniform interpretation of the LHWCA status test, has simply ignored the congressional mandate to apply a "simple, uniform standard of coverage," P.C. Pfeiffer Co. v. Ford, 444 U.S. at 83. Decisions of the United States Supreme Court are final and authoritative with respect to the construction and application of federal statutes. Absent clear words to the contrary construction of the language in a federal statute is a federal question. Western Air Lines v. Board of Equalization, 480 U.S. __, 94 L.Ed.2d 112, 119 (1987). A state court is not free to follow its own dictates or precedent, in the face of contrary federal authority on a federal question.

> [R]ecognition of the role of state courts as the final

> expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.

England v. Louisiana Medical Examiners, 375 U.S. 411, 415-16 (1964). See also Harman v. Forssenius, 380 U.S. 528 (1965). As this Court admonished in an earlier demonstration of independence by the Supreme Court of Virginia:

> [T]he vice of this position is that, in following its own prior decision, the court ignored the decision of this court to the contrary. This lawfully it could not do, the question, as we have shown, being a federal question to be determined by the application of federal law. The determination by this court of that question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding.

Chesapeake & Ohio Railway v. Martin, 283 U.S. 209, 220-221 (1931).

The mischief created by this aberrant state court decision will not be limited to the parties in these actions. The judges in Virginia's trial courts, as well as those Federal administrative boards located in Virginia, must now immediately confront the dilemma of whether to apply Caputo, Pfeiffer and their progeny, or bow to stare decisis and "blindly follow" the Schwalb-McGlone decision. See Opinion by Chief Judge Schlitz, at 28A.

An indirect consequence of the Schwalb-McGlone decision will be "forum shopping" by, for example, pierside railroad workers in other states who seek to avoid compensation under the LHWCA. Due to the vagaries of Virginia's venue statue, a resident of any state can bring an action in

Virginia against his or her employer doing business in the state of Virginia; the action is not vulnerable to dismissal or transfer even if the plaintiff and all witnesses reside in another state and the accident occurred outside Virginia. Va. Code § 8.01-265 (1950 as amended).[6/] If the Schwalb-McGlone decision remains viable, there is little doubt that Virginia courts will soon teem with foreign FELA actions, brought by maritime plaintiffs escaping federal and state courts elsewhere that adhere to the federal standard. This is hardly the result Congress intended when it amended the LHWCA to establish a simple,

---

[6/] The Supreme Court of Virginia has recently agreed to hear argument on the constitutionality of this statute. Seaboard Systems Railroad, Inc. v. Caldwell, Record No. 870490 (Va. Sup. Ct.) (presently pending argument).

uniform standard of coverage. To allow the Schwalb-McGlone decision to stand would frustrate the spirit and purpose of the LHWCA, create a favored class of maritime employees, and perpetuate a dichotomous approach to the LHWCA status test.

CONCLUSION

For the above reasons, petitioner Chesapeake & Ohio Railway Company respectfully submits that this petition should be granted and that the judgments by the Supreme Court of Virginia should be reversed.

Respectfully submitted,

CHESAPEAKE & OHIO RAILWAY
COMPANY

By William T Prince

William T. Prince
John Y. Richardson, Jr.
Joan F. Martin
Williams, Worrell, Kelly & Greer, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Petition for a Writ of Certiorari upon the Respondent, Nancy J. Schwalb at the office of her counsel of record, C. Gerard Thompson, Commerce Bank Building, 500 Crawford Street, P. O. Box 1158, Portsmouth, Va. 23705, and upon the Respondent, William McGlone, at the office of his counsel of record, C. Gerard Thompson, Commerce Bank Building, 500 Crawford Street, P. O. Box 1158, Portsmouth, Va. 23705, pursuant to the requirements of Rules 28 and 33 of the Rules of the Supreme Court of the United

States, by depositing same in a United States mail box, with first class postage prepaid, addressed to Respondents as set forth above, on or before June 2, 1988.

I further certify that I am a member of this Court, and that all parties required to be served have been served on or before June 2, 1988.

William T. Prince

William T. Prince
Of Counsel for
Petitioner

APPENDIX

APPENDIX INDEX

SUBJECT PAGE

1. Opinion of Supreme Court of Virginia, dated March 4, 1988, in cases of Schwalb and McGlone v. Chesapeake & Ohio Railway Company............1A

2. Opinion of Judge Douglas M. Smith of The Circuit Court of the City of Newport News, Virginia, dated August 8, 1984, in case of Schwalb v. Chesapeake & Ohio Railway Company.........................19A

3. Opinion of Judge Lester E. Schlitz of the Circuit Court of Portsmouth, Virginia, dated May 29, 1985, in case of McGlone v. Chesapeake & Ohio Railway Company...........22A

4. Order of the Circuit Court of the City of Newport News, Virginia, dated August 22, 1984, dismissing case of Schwalb v. Chesapeake & Ohio Railway Company.................31A

5. Order of the Circuit Court of the City of Portsmouth, Virginia, dated June 13, 1985, dismissing case of McGlone v. Chesapeake & Ohio Railway Company.................33A

SUBJECT PAGE

6. Order of Supreme Court of Virginia, dated March 4, 1988, reversing and remanding the case of Schwalb v. Chesapeake & Ohio Railway Company..........35A

7. Order of Supreme Court of Virginia, dated March 4, 1988, reversing and remanding the case of McGlone v. Chesapeake and Ohio Railway Company..........37A

8. 33 U.S.C. § 902(3)..........39A

9. 33 U.S.C. § 905(a)..........42A

10. Opinion of the late Judge Charles R. Waters, II of the Circuit Court of the City of Norfolk, Virginia, dated November 13, 1986, in the case of Goode v. Norfolk & Western Railway Company..........44A

11. Order of Supreme Court of Virginia, dated April 22, 1988, reversing and remanding the case of Goode v. Norfolk & Western Railway Company..........58A

12. Opinion of Judge J. Warren Stephens of the Circuit Court of the City of Newport News, Virginia, dated May 21, 1984, in the case of

Turnista v. Chesapeake &
Ohio Railway Company............60A

PRESENT: ALL THE JUSTICES

OPINION BY JUSTICE RICHARD H. POFF

March 4, 1988

Record No. 841743

NANCY J. SCHWALB

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE
CITY OF NEWPORT NEWS

Douglas M. Smith, Judge

Record No. 850728

WILLIAM MCGLONE

v.

THE CHESAPEAKE AND
OHIO RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH

Lester E. Schlitz, Judge

In this appeal, we review two judgments entered in separate actions, each sustaining a plea to the jurisdiction. Claiming damages for personal injuries, each plaintiff had invoked the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) (FELA). In each appeal, the sole issue is whether the plaintiff was a statutory employee as defined in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982) (LHWCA or the Act). If so, the parties agree that the remedy provided by the Act is exclusive, see 33 U.S.C. § 905(a) (1982), and that we should affirm the judgments.

The two plaintiffs are Nancy J. Schwalb and William C. McGlone. Each was an employee of the defendant, The Chesapeake and Ohio Railway Company.

Although the accidents resulting in the plaintiffs' injuries occurred at different times, the facts in the two cases, insofar as relevant to the issue common to the two appeals, are substantially identical. Each plaintiff was employed as a laborer to perform housekeeping and janitorial services in the offices, shops, bathrooms, and other places situated on the defendant's pier and adjacent property in Newport News. This property is equipped with facilities designed to transfer coal from railroad cars to ships moored at the pier. A "dumper", activated by "trunnion rollers", upends railroad cars and dumps the coal into "hoppers". The coal falls from the hoppers onto conveyor belts that carry it to a "loading tower" from which it is poured into the hold of a ship.

Coal spilled on the trunnion rollers can cause the dumpers to malfunction. Coal falling and accumulating beneath the conveyor belts eventually may damage the belts and interrupt the loading process. As part of the duties assigned by the defendant, the plaintiffs were required to clear away coal spilled in these areas. Because they were not members of a longshoremen's union, the plaintiffs were forbidden to load that coal onto the conveyor belts. The plaintiff McGlone was clearing away coal beneath a conveyor belt at the time he was injured. The plaintiff Schwalb was injured in a fall as she was walking along a "catwalk" approaching the trunnion rollers.

The parties in both cases agree that the defendant railroad is a statutory employer as defined in the LHWCA, that is, an employer "any of whose employees are employed in maritime employment, in whole or in part". 33 U.S.C. § 902(4) (1982). The plaintiffs' contention is that the trial courts erred in ruling that they were statutory employees as defined in the Act. The plaintiffs rely upon our decision in White v. N. and W. Ry. Co., 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977). Reviewing a judgment based on such a ruling, we applied the Act as amended in 1972, Pub. L. No. 92-576, 86 Stat. 1251, to the facts in White. First enacted in 1927, Pub. L. No. 69-803, 44 Stat. (part 2) 1424, the LHWCA was the first successful congressional response to the Supreme Court's decision in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). There, the Court had ruled that a state worker's compensation act could not constitutionally apply to a longshoreman injured in an accident that had occurred on a gangplank between a pier and a ship. Initially, Congress sought to authorize states to extend their workers' compensation statutes seaward of the Jensen line, but the Court held the state statutes to be unconstitutional delegations of congressional power. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).

Although the federal Act filled a workers' compensation void, the LHWCA, as originally enacted, provided coverage only when "disability or death result[ed] from an injury occurring upon the navigable waters of the United States". 33 U.S.C. § 903(a) (1927). Federal compensation coverage stopped at the Jensen line; the Act did not apply to a longshoreman injured at work on a pier, even though engaged in traditional longshoremen's functions. Nacirema Operating Co. v. Johnson, 396 U.S. 212, 218-20 (1969).

The 1972 amendments to the LHWCA moved the Jensen line landward to include areas adjoining navigable waters and "customarily used by an employer in loading, unloading, repairing, or building a vessel". 33 U.S.C. § 903(a) (1982). Yet, Congress did not extend federal coverage to every worker injured in such areas, for it added an amendment defining a covered employee as "any person engaged in maritime employment." 33 U.S.C. § 902(3) (1982). The effect of the two amendments was to create a two-pronged coverage test -- the situs of the injury and the status of the injured worker.

In White, a railroad employee filed a claim under FELA. He had been injured on a situs covered by the LHWCA, and "the critical question presented . . . [was] whether plaintiff was a 'person engaged in maritime employment' and thus an 'employee' within the meaning of the Act." 217 Va. at 827, 232 S.E.2d at 809. White was hired as an electrician to maintain and repair the electrical equipment used at a pier to dump coal from railroad cars, to move conveyor belts transporting the coal, and to load the coal into ships. Although White did not operate any of the equipment employed in the loading process, the railroad argued that "all of his activity was 'functionally related' to the loading of coal on ships", id. at 831, 232 S.E.2d at 812, and that he was, therefore, an employee engaged in maritime employment and, as such, was limited to the remedy provided by the LHWCA.

In White, the railroad had borrowed the "functional relationship" formula from the opinion in Sea-Land Service, Inc. v. Director, Office of Workers' Compensation, 540 F.2d 629, 637-38 (3d Cir. 1976). Considering the history of the Act and construing the congressional intent underlying the 1972 amendments, we rejected that formula. We adopted, instead, the standard articulated in Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir.), cert. denied, 429 U.S. 868 (1976)[1]:

> [F]or an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity

---

[1] The Supreme Court disapproved application of a significant relationship standard to determine the status of the worker in Director, OWCP v. Perini North River Associates, 459 U.S. 297, 302 n.8, 318-19 (1983). The Court did not, however, disapprove a significant relationship standard as a concept when applied, as in Gilmore, to post-1972 coverage landward of the Jensen line. As noted by the majority in Herb's Welding, Inc. v. Gray, 470 U.S. 414, 424 n.10 (1985) (quoting Perini, 459 U.S. at 299, 324 n.34) the decision in Perini "was carefully limited to coverage of an employee 'injured while performing his job upon actual navigable waters' . . . [and] was, 'of course,' limited to workers covered prior to 1972".

> involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903.

Applying the Gilmore standard, we said that "we do not believe plaintiff's duties . . . had a realistically significant relationship to the loading of cargo on ships", that "plaintiff was not a covered 'employee' within the meaning of the Act", and that "the order dismissing plaintiff's FELA action will be reversed". 217 Va. at 832-33, 232 S.E.2d at 813.

In the appeals at bar, the defendant railroad relies on Price v. Norfolk & W. Ry. Co., 618 F.2d 1059 (4th Cir. 1980). There, the plaintiff in an FELA action was a painter employed by the defendant railroad. He sustained an injury while painting the support towers of a structure housing a conveyor belt system used in loading grain into the hold of a vessel. The Price court reasoned that, because "the failure to paint would eventually lead to severe rusting that would halt the entire [loading] process", id. at 1062 n.4, the plaintiff was engaged in maritime employment and, consequently, "was an 'employee' within the meaning of the LHWCA which provides an exclusive remedy", id. at 1062.

We cannot agree that Congress intended the 1972 amendments to have such pervasive and preclusive effects. Nor do we agree with the argument advanced by the railroad in these appeals that the Supreme Court implicitly has overruled our decision in

White. On brief, the defendant says that "the U.S. Supreme Court has stated that one is engaged in maritime employment if he is 'engaged in the overall process of loading and unloading vessels' (emphasis supplied)." For this proposition, the defendant cites Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). The language the defendant quotes from that decision is an abbreviated excerpt lifted from a longer passage, the import of which we construe differently.

The injuries at issue in Caputo were sustained during the process of unloading a ship. Considering the reports of the congressional committees that initiated the 1972 amendments, the Court concluded that Congress intended

> to cover those workers involved in the essential

> elements of unloading a vessel -- taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area . . . . . [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truckdrivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered. Also excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo.

Id. at 267 (emphasis added). As we construe this language, the Court reasoned that, although clerical employees working on a covered situs may have responsibilities related to the commercial process, unless they are "engaged in the handling of cargo", they are not "involved in the essential elements of [loading or] unloading a vessel" and, therefore, are not statutory employees for purposes of the LHWCA. Id.

We recognize that the Act is remedial in purpose and, as the defendant says, that "Caputo requires an expansive view of LHWCA". We note, however, that the Court speaks of covered workers as those "involved in the essential elements of unloading a vessel", id.; as those "directly involved in the loading or unloading functions", id. at 271 (quoting S. Rep. 1125, 92d Cong., 2d Sess. 13 (1972) and H.R. Rep. 1441, 92d Cong., 2d Sess. 11 (1972)); and as those who "spend at least some of their time in indisputably longshoring operations", id. at 273. Two years following Caputo, the Court said that "workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act."

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 82 (1979). And the Supreme Court, recalling the language of Caputo, emphasized in its most recent analysis of the status test that the purpose of the maritime employment requirement was "to cover those workers on the situs who are involved in the essential elements of loading and unloading". Herb's Welding, Inc. v. Gray, 470 U.S. 414, 423 (1985) (emphasis added).

We believe the "essential elements" standard is more nearly akin to the "significant relationship" standard we adopted in White than the "overall process" construction invoked by the defendant. In this respect, we see no logical difference between workers "who perform purely clerical tasks", Caputo, 432 U.S. at 267, and workers who perform purely maintenance tasks, such as painting, or workers who, like the plaintiffs in these appeals, perform purely housekeeping and janitorial tasks.

Applying the rule in White, we hold that the plaintiffs were not statutory employees as defined in the LHWCA. We will reverse the judgments dismissing the plaintiffs' FELA actions and remand the cases for trials on the merits.[2/]

[2/] In the Schwalb appeal, the defendant argues that the plaintiff "is estopped from denying LHWCA coverage" because she accepted compensation paid under the Act. According to the defendant's brief, "[s]he expresses no agreement to off-set compensation payments previously received against any recovery under FELA and, therefore, double recovery remains a possibility." But, in a memorandum of law filed in the trial court, we find that the plaintiff acknowledged that "any recovery by

Footnote continued on next page.

Record No. 841743 - Reversed and remanded.
Record No. 850728 - Reversed and remanded.

Footnote continued from previous page.

plaintiff on her FELA claim will be reduced by the amount of LHWCA benefits she may have already received." A railroad worker who makes such a concession does not seek a double recovery and is not precluded from pursuing a remedy under FELA. Freeman v. Norfolk and Western Ry. Co., 596 F.2d 1205, 1208 (4th Cir. 1979); accord Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037, 1049 (4th Cir. 1980).

SEVENTH JUDICIAL CIRCUIT OF VIRGINIA
Newport News, Virginia 23607

August 8, 1984

Ms. Frances S.P. Li
Suite 565
608 2nd Avenue
South Minneapolis, Minnesota 55402

Mr. William W. Nexsen
Stackhouse, Rowe & Smith
P. O. Box 3570
Norfolk, Virginia 23514

Mr. Richard Wright West
West, Stein, West & Smith
P. O. Box 257
Newport News, Virginia 23607

Re: Nancy J. Schwalb v. The
Chesapeake and Ohio Railway
Company At Law No.8827

Dear Counsel:

You will recall that on June 6, 1984, the Court heard argument on a special plea to jurisdiction in the above captioned cause. This special plea was filed by the defendant C&O, in which they contend that the plaintiff's sole remedy in this cause is under LHWCA and consequently this court lacks jurisdiction on the motion for judgment.

The Court heard evidence of witnesses, stipulations by counsel, has read the memorandums of law and cases cited therein and am rendering my decision by this letter.

The plaintiff and defendant both agree that to be covered under LHWCA an injured employee must meet both a situs and a status test, both sides agree that the situs test has been met. This leaves as the only question involved whether or not the plaintiff employee is engaged in maritime employment and the Court holds that the plaintiff Schwalb is so engaged, as her duties were essential to the loading and unloading of coal by conveyor belt to the ships moored at the docks. It is uncontradicted that if the spilled coal was not removed that it could have haulted the process of loading the coal aboard the vessels. With the liberal interpretations expressed in decisions by the United States Supreme Court this Court has no difficulty in determining that the plaintiff's remedy is under the LHWCA. Therefore, the plea to the jurisdiction is sustained and I am requesting Mr. West to draw the appropriate order, noting plaintiff's exception and objection and having the order endorsed by opposing counsel and returning to the Court for entry.

Very truly yours,

Douglas M. Smith
Judge

THIRD JUDICIAL CIRCUIT

Circuit Court of the City of Portsmouth

May 29, 1985

Richard Wright West, Esquire
P.O. Box 257
Newport News, Virginia 23607

Russell N. Brahm, III, Esquire
P.O. Box 1138
Portsmouth, Virginia 23705-1138

Re: William McGlone v. Chesapeake and Ohio Railway Co. L84-327

Gentlemen:

Thank you for your excellent and most exhaustive memoranda. I have reviewed the pleadings, the evidence and the argument of counsel, and I have read the memoranda and all of the cases cited.

William McGlone, plaintiff, was injured at Newport News, Virginia, on February 1, 1983, and filed his

Motion for Judgment against the Chesapeake and Ohio Railway Company, defendant, on May 31, 1983, under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51, et. seq. Defendant filed a special plea to the jurisdiction on June 24, 1983, on the ground that plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a).

A hearing on the special plea was heard by this Court on March 29, 1985, evidence taken and a transcript prepared. It appears from the evidence that plaintiff and employee of the Chesapeake and Ohio Railway Company on the date of the accident was working on the pier as a laborer cleaning up coal which had fallen from a conveyor belt which was being used to load coal onto a ship at the pier. The hopper and conveyor belt is an extension of the pier. If coal is not removed in the area where the plaintiff was cleaning up, the coal would eventually interfere with the loading operation and bring it to a halt. This work was frequently done by the plaintiff. Plaintiff was injured by the conveyor belt while engaged in this work. The sole action involved here is whether the plaintiff at the time of his injury was working in a maritime capacity as defined by the LHWCA.

An injured employee must meet both a "situs" and a "status" test in order to be covered under LHWCA. There seems to be no question here that the injured [sic] occurred in a covered situs but we must determine whether plaintiff occupied a status covered under LHWCA. Noqueira v. New York, N.H., and H.R. Company. 281 U.S. 128, (1930).

The Court must resolve a conflict in the case law between a decision of the Supreme Court of Virginia, White v. Norfolk & Western Railway Co., 217 Va. 823 (1977), cert. denied, 434 U.S. 860 (1977) and Price v. Norfolk & Western Railway Company, 618 F2d 105 (1080) [sic], decided by the Fourth Circuit Court of Appeals. In White the court stated at page 832:

> "Plaintiff was not actually handling any cargo either manually or mechanically, as was the case in the decisions principally relied on by N & W. Moreover, plaintiff was not manipulating (except to test) any of the controlls of the electrical mechanism, which furnished the power for

> this automated loading process. Rather, he was only maintaining the electrical device on the shore and attached to the pier, work which is not the traditional work of a ship's service employee. Plaintiff was at least one step removed from a realistically significant relationship and from a direct involvement with the loading of vessels. The mere fact that some of the plaintiff's cumulative injury was sustained out over the Elizabeth River while he worked inside the electrial rooms of the Pier 6 ship loaders, does not convert his status from that of a railroad electrician to that of a maritime worker."

It can thus be seen that the Virginia Supreme Court held that to qualify as an employee under LHWCA the plaintiff must have been directly involved in the loading of coal. Under this ruling plaintiff could not have been held to be an employee under LHWCA.

Price decided three years after White holds to the contrary.

The Fourth Circuit held that a railway employee who was injured while painting towers used in the loading of ships was an employee under LHWCA. The court held that merely because the employee was not directly involved in the actual loading of ships, this fact did not remove him from coverage under LHWCA because the maintenance of the towers was essential to the movement of maritime cargo and thus the employee was included in the broad concept of maritime employment.

This view has been upheld in many Federal court decisions. See: Newport News Shipbuilding and Drydock Company v. Graham, 573 F2d 167 (4th Circuit), cert. denied, 439 U.S. 979, 99

S.Ct. 563 (1978); Northeast Marine Terminal Company v. Caputo, 432 U.S. 249, 97 S.Ct. 2348 (1977).

It will thus be seen that the Fourth Circuit has adopted a broad concept of maritime employment that maintenance of maritime cargo loading equipment is essential to the loading of cargo and is, therefore, included in the meaning of a person engaged in maritime employment under LHWCA.

White stands alone in contrast to the federal decisions which were decided after the decision in White.

Should this court blindly follow White because it is a State court decision, under the principle of stare decises? To do so would be to interpret a Federal law contrary to all of the decisions of the Federal courts which have declined to follow White and have disagreed with its results. It is the Court's belief that this conflict between the Supreme Court of Virginia and the Fourth Circuit Court of Appeals must be resolved in favor of the latter decisions of the federal courts and this Court reluctantly and respectfully declines to follow White since it feels the decision in Price is now controlling.

The Court is of the opinion that the plaintiff in this case, under the facts presented, was engaged in activity which made him an employee under the meaning of LHWCA, and that he is precluded from maintaining a FELA action in this case.

Defendant's special plea to the jurisdiction of this Court is sustained, and the plaintiff's Motion for Judgment will be dismissed from the docket.

Counsel for the defendant will prepare and circulate a sketch order in accordance with this letter and for presentment to the Court for entry.

Sincerely yours,

Lester E. Schlitz
Chief Judge

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS

NANCY J. SCHWALB,

Plaintiff,

vs. Law No. 8827-S

THE CHESAPEAKE AND OHIO RAILWAY
COMPANY, A CORPORATION,

Defendant.

ORDER

On June 6, 1984 came the parties and their attorneys, and the Court heard evidence and the argument of counsel upon the defendant's Special Plea To Jurisdiction. And having further considered the memoranda of the parties and having maturely considered the same, the defendant's Special Plea to Jurisdiction is SUSTAINED for the reasons more fully set forth in the Court's letter opinion of August 8, 1984.

Accordingly, this action is DISMISSED with prejudice to the plaintiff.

DATE:

ENTER: 8-22-84

/s/ D.M. Smith
Judge

I ask for this:
/s/Richard W. West
Counsel for Defendant

Seen and exception noted:
/s/William W. Nexsen
Counsel for Plaintiff

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF PORTSMOUTH
ON THE 13TH DAY OF
JUNE, 1985.

WILLIAM C. McGLONE,

Plaintiff,

v. LAW NO.: L-83-327

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,

Defendant.

ORDER

On March 29, 1985 came the parties and their respective attorneys, and the Court heard evidence and the argument of counsel upon the defendant's Special Plea to Jurisdiction. And having further considered the Transcript of the hearing conducted on March 29, 1985, the memoranda of the parties, and having maturely considered the same, the defendant's Special Plea to Jurisdiction is SUSTAINED for the reasons more fully set forth in the Court's letter opinion of May 29, 1985.

Accordingly, this action is DISMISSED with prejudice to the plaintiff. It is further ORDERED that the Transcipt of the evidentiary hearing be made part of the Record in this case pursuant to Rule 5:9 of the Rules of Court.

DATE:

ENTER: 6-13-85

/s/ W.H.O.
Judge

I ask for this:
/s/Richard W. West
Counsel for Defendant

Seen and exception noted:
/s/Russell N. Brahm III
Counsel for Plaintiff

Filed March 4, 1988

SUPREME COURT OF VIRGINIA

Record No. 841743
Circuit Court No. L-8827-S

Nancy J. Schwalb, Appellant,

against

The Chesapeake and
Ohio Railway
Company, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Newport News on the 22nd day of August, 1984.

For reasons stated in writing and filed with the record, the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk

Filed March 4, 1988

SUPREME COURT OF VIRGINIA

Record No. 850728
Circuit Court No. L-83-327

William McGlone, Appellant,

against

The Chesapeake and
Ohio Railway
Company, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Portsmouth on the 13th day of June, 1985.

For reasons stated in writing and filed with the record, the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit cout for trial on the merits.

This order shall be certified to the said circuit court.

A copy,

Teste:

Clerk

33 U.S.C. § 902. Definitions

When used in this chapter--

* * * * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include --

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 905. Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

* * * * *

FOURTH JUDICIAL CIRCUIT OF VIRGINIA

CIRCUIT COURT OF THE CITY OF NORFOLK

November 13, 1986

Eddie W. Wilson, Esquire
2200 Colonial Avenue, Suite 12-B
P. O. Box 11168
Norfolk, Virginia 23517

John Y. Richardson, Jr., Esquire
Williams, Worrell, Kelly & Greer, P.C.
600 United Virginia Bank Building
P. O. Box 3416
Norfolk, Virginia 23514-3416

Re: Robert T. Goode, Jr. vs
Norfolk and Western Railway Co.
At Law No. L-86-335

Gentlemen:

Thank you for the help that you have given the court. I have studied all of the material supplied, including the opinions cited in your excellent briefs.

If this case were one of first impression, I would be tempted to rule that Congress, by enacting the

Longshoremen's and Harbor Workers' Compensation Act (L.H.W.C.A), did not intend to strip a railroader of any of his benefits under the Federal Employer's Liablility Act (F.E.L.A.) under any circumstances so long as he was working for the railroad at the time of injury, a narrow, unintellectual approach which makes good sense.

The duty of this court, however, is not to make law but to interpret and follow the law as set forth by courts of higher dignity. In following that duty, I feel that I am directed by the existing law to rule that, under the particular facts of this case, the motion for judgment must be dismissed for reason that exclusive jurisdiction lies within the ambit of the L.H.W.C.A.

Railroad cars filled with coal come cross country in both interstate and intrastate commerce and come to rest in what is called the barney yard located near pier 6 at the Lambert's Point terminal in Norfolk, Virginia. After the coal has come to rest in the barney yard, the process of loading the coal into vessels begins. The loaded cars are moved from the barney yard through a thawing shed, and are then pushed up a raised track by small locomotives called pushers onto the dumper located near the piers. As these loaded cars are pushed on to the dumper, their progress is slowed or stopped by equipment known as a retarder. The cars revolve, dumping the coal onto conveyor belts which deliver the dumped coal directly into the holds of waiting vessels docked at the piers. The empty cars are pushed to the apex of the raised track and then, through the force of gravity, are returned to a holding yard from where they will again be dispatched to coal fields located in various parts of the country.

The plaintiff was a machinist who was injured while repairing the retarder on the dumper located near pier 6. The dumper and retarder on which the plaintiff was working are located 500 to 550 feet from the water. Retarders are located throughout the railroad system; however, the sole purpose of this retarder was to stop the loaded cars on the dumper to facilitate the transportation of coal from shore to vessel by dumping the coal on conveyor belts which feed the coal into the belly of docked vessels at pier 6. The entire loading operation at pier 6 must cease when the retarder is inoperative or is being repaired, and the loading operation had in fact ceased at the time of the injury to the plaintiff.

Machinists may be assigned to what is known as the Motive Power Department which has the function of maintaining and operating the coal dumping facility of the railroad. Machinists may be assigned to different locations such as the 38th Street car shop or the roundhouse, which may be miles away from the water, or they may be assigned to Lambert's Point. The location is determined by seniority, and a machinist working at the pier at Lambert's Point may be forced to work at another location because of the electing of a more senior machinist to work at the pier. At the time of the accident, the plaintiff had been assigned for some time to work at Lambert's Point. While assigned to Lambert's Point, machinists spend the overwhelming portion of their working time maintaining and repairing machines and equipment essential to the coal dumping operation. Machinists do not, for example, regularly repair cars for that is the job of the trainmen. The great majority of the working time of a machinist while assigned to Lambert's Point is spent on the maintenance and repair of machinery which facilitates the dumping operation after the cars have left the barney yard. The machinists are required to pay into the railroad retirement plan and are subject to the Railway Labor Act.

Under the facts of this case, the railroad is an employer within the meaning of the L.H.W.C.A., Noqueira v. New York, N.H. & H.R. Co., 281 U.S. 128, 132, 44 L.Ed. 754, 50 S.Ct. 303 (1930), and the plaintiff is an employee within the meaning of the L.H.W.C.A., Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 53 L.Ed. 2d 320, 97 S.Ct. 2348 (1977); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 62 L.Ed. 2d 255, 100 S.Ct. 328 (1979), and he cannot walk in and out of coverage because, I believe, that the overwhelming portion of his work is essential to the loading and unloading operation.

The Supreme Court in Herb's Welding v. Gray, ____ U.S. ___, 84 L.Ed. 2d 406 (1985), while holding that a welder working on a fixed offshore oil-drilling platform was not engaged in maritime employment within the meaning of L.H.W.C.A., has stated:

> But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading. (Emphasis added).
>
> We have never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation. (Emphasis added).

On the facts of this case, I hold that the plaintiff was involved in the essential elements of loading and unloading and that he was actually involved in moving cargo between ship and land transportation. After all, the entire loading operation ceased during the repair of the retarder on which the plaintiff was working when injured. The location of the retarder was on the dumper, and the sole purpose of this particular retarder was to stop coal-loaded cars so that the coal could be dumped onto the belts feeding the vessel. It must be remembered that plaintiff's supervisors testified that 99 percent of the work of a machinist assigned to Lambert's Point was the maintenance and repair of machines and equipment directly and solely related to the loading and unloading operation. Even the most biased witnesses could not seriously testify that less than 50 percent of the work was not so related, while the machinist was assigned to Lambert's Point.

The plaintiff places a great deal of emphasis on White v. N & W. Ry. Co., 217 Va. 832 (1977), decided in the same year as Conti v. N. & W. Ry. Co., 566 F.2d 890 (4th Cir.).

It is my belief that, under the facts of this case, the plaintiff did have "a realistically significant relationship to the loading of cargo on ships" and that he was directly involved in the process of loading coal on the vessels within the meaning of the White test. Furthermore, this case does involve a federal question, the federal authorities are therefore the more persuasive, and to the extent that White differs from significant federal decisions, the White court, in my opinion must yield.

As counsel well know, there have been a number of significant decisions subsequent to White, one of the leading decisions being Price v. Norfolk &

Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980). In my opinion, the Price court did set forth the proper test in determining whether there is exclusive coverage under the L.H.W.C.A., that test being whether the plaintiff's job was an essential element in the loading and unloading of the vessels. I hold that in this case the plaintiff's job was an essential element, although in light of the later ruling in Herb's Welding, supra, I would not hold that the painter's job in the Price case was an essential element.

I believe that Newport News Shipbuilding & Dry Dock v. Graham, 573 F.2d 167 (4th Cir.), cert. den., 439 U.S. 979, 58 L.Ed. 2d 649, 99 S.Ct. 563 (1978), fortifies my opinion in this case, and I do not think that this opinion is in substantial conflict with Conti v. N. & W. Ry. Co., 566 F.2d 890 (4th Cir. 1977), although I do agree with the D.C. Circuit Court that even before Herb's Welding, supra, the Fourth Circuit had moved away from a test of balancing traditional railroad tasks against traditional maritime tasks. Harmon v. Baltimore & Ohio R.R., 741 F.2d 1398 (D.C. Cir 1984).

I am cognizant of my colleague's decision in Evans v. N. & W. Ry. Co. (Norfolk Circuit Court 1985), but likewise do not feel that we are in conflict. After a close reading of his decision, I believe that, under the facts of this case, Judge Clarkson would have reluctantly reached the same decision which I have reluctantly reached.

With regard to the situs test, I hold that the most important factor is the nature of the work rather than the distance from the water and that the test has been met. Graham, supra; Prolerized New England Co. v. Miller, 691 F.2d 45 (1st Cir. 1982); Prolerized New England Co. v. Ben. Rev. Bd., 637 F.2d 30 (1st Cir. 1980), cert. den. 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed. 2d 952 (1981); Sea-Land Serv. v. Director, etc., 685 F.2d 1121 (9th Cir. 1982); Garvey Grain Co. v. Director, etc., 639 F.2d 366 (7th Cir. 1981).

I commend both counsel for their thorough preparation for the hearing and their excellent briefs.

Mr. Richardson may prepare the order for Mr. Wilson's endorsement.

Please have the order forwarded to me prior to November 19, 1986, if possible.

Very truly yours,

Charles R. Waters, II
Judge

April 22, 1988

SUPREME COURT OF VIRGINIA

Record No. 870252
Circuit Court No. L86-335/L2341-86

Robert T. Goode, Jr., Appellant,

against

Norfolk & Western Railway
Company, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Norfolk on the 17th day of December, 1986.

Upon consideration of the record and briefs, and on the basis of Schwalb v. C & O Railway Co., 235 Va. ____, ____ S.E.2d ____ (1988), the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A copy,

Teste:

David B. Beach, Clerk

By: /s/ Cynthia L. McCoy
Deputy Clerk

SEVENTH JUDICIAL CIRCUIT
Newport News, Virginia
May 21, 1984

Mr. Michael L. Weiner
DeParcq, Perl, Hunegs,
Rudquist & Koenig, P.C.
608 Building, Room 565
608 Second Avenue South
Minneapolis, Minnesota 55402

Mr. William M. Nexsen
Stackhouse, Rowe & Smith
1400 Sovran Center
Post Office Box 3570
Norfolk, Virginia 23514

Mr. Richard Wright West
West, Stein, West & Smith
Post Office Box 257
United Virginia Bank Building
2501 Washington Avenue
Newport News, Virginia 23607

Re: Daniel C. Turnista v.
The Chesapeake and Ohio
Railroad Company, a
corporation, Law No. 8690-WS

Gentlemen:

The court has reviewed the pleadings and argument, the evidence and the excellent memoranda.

Daniel C. Turnista (plaintiff) was injured at Newport News, Virginia on April 19, 1982 and filed his Motion for Judgment against The Chesapeake and Ohio Railroad Company (defendant) on August 25, 1983, under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51, et seq.. Defendant filed its Special Plea to Jurisdiction (special plea) on September 15, 1983, asserting that plaintiff's sole and exclusive remedy against it is under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a). If defendant's contention is valid, then relief under LHWCA is plaintiff's exclusive remedy and the FELA action must be dismissed.

On March 28, 1984 at the time of the hearing on the special plea, the parties stipulated that:

> (1) defendant is an "employer" as defined by 33 U.S.C. 902(4) of LHWCA at the time of plaintiff's accident;
>
> (2) that plaintiff was then and there employed by defendant; and
>
> (3) that the injuries of which plaintiff complains occurred "upon the navigable waters of the United States" as defined by U.S.C. §903(a) of LHWCA.

The sole issue is whether the plaintiff at the time of his injuries was a person engaged in maritime employment as defined by 33 U.S.C. §902(3) of LHWCA.

The facts are not in contention. The evidence disclosed that plaintiff, a machinist, was injured in a fall onto a barge while burning shackles loose with an acetylene torch as a part of the work required to replace the hood of the offshore coal loading tower on the south side of Pier 14. As a machinist in the mechanical department of defendant, plaintiff spent 50% or more of his working time between the coal loading dumper and the end of the piers, and, otherwise worked in a shop located between the dumper and Pier 14, primarily performing repair and maintenance on coal loading equipment.

The evidence further disclosed that in proceedings pending before U.S. Department of Labor, Office of Workers' Compensation Programs, defendant had paid plaintiff under LHWCA (as of time of hearing), compensation payments aggregating in excess of $29,500.00, and, that plaintiff (though disputing defendant's computation of weekly wage and length of disability) had not challenged coverage under said Act for injuries received on April 19, 1982.

Resolution of this issue comes down to whether the court is required to follow a decision of the Virginia Supreme Court rendered in 1977 or one of the United States Court of Appeals, Fourth Circuit rendered in 1980.

In a unanimous opinion of the United States Supreme Court in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268, 97 L. Ed. 2d 320, 335 (argued April 18, 1977; decided June 17, 1977), Justice Marshall stated:

> "***The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act 'must be liberally

> construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' Voris v. Eikel, 346 US 328, 333, 98 L Ed 5, 74 S. Ct. 88 (1953).***"

The Virginia Supreme Court decision in White v. Norfolk and Western Railway Company, 217 Va. 823, 232 S.E. 2d 801 (1977), cert. denied 434 U.S. 860 (1977) was rendered on March 4, 1977 and held that White was not a covered "employee" within the meaning of the Act, saying at page 832:

> "Applying the section 2(3) language defining 'employee' in the light of what we perceive to have been Congress' purpose when the 1972 Amendments were adopted, we do not believe plaintiff's duties, in the electrical rooms where the injury allegedly occurred, had a realistically significant relationship to the (833) loading of cargo on ships. Stated differently, when plaintiff was injured he was not directly involved in the loading of coal. See Jacksonville Shipyards, Inc.

> v. Perdue, supra, 539 F.2d at 539.
>
> "Plaintiff was not actually handling any cargo, either manually or mechanically, as was the case in the decisions principally relied on by N&W. Moreover, plaintiff was not manipulating (except to test) any of the controls of the electrical mechanism, which furnished the power for this automated loading process. Rather, he was only maintaining the electrical devices on the shore and attached to the pier, work which is not the traditional work of a ship's service employee. Plaintiff was at least one step removed from a realistically significant relationship and from a direct involvement with the loading of vessels. The mere fact some of plaintiff's cumulative injury was sustained out over the Elizabeth River, while he worked inside the electrical rooms of the Pier 6 shiploaders, does not convert his status from that of a railroad electrician to that of a maritime worker.

Thus, the Virginia Supreme Court (in opinion rendered by five justices), in effect, narrowly held that to be an "employee", the plaintiff must have been directly involved in the loading of the coal (emphasis supplied).

In Price v. Norfolk and Western Railway Company, 618 F.2d 105 (1980), the Fourth Circuit held that a railroad employee injured while painting support towers for the gallery used for conveying grain (loading and unloading ships and barges and not for storage) as a part of routine maintenance for which Norfolk and Western was responsible was "an employee" within the meaning of LHWCA (33 U.S.C. §902(3). In concluding (page 1062) that "***The Gallery involved here is just as essential to the actual loading and unloading of ships as the machine involved in Graham was to their building***", the opinion reviewed applicable decisions since Northeast Marine Terminal, at page 1061:

> "We feel that our decision in Newport News Shipbuilding & Drydock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979, 99 S.Ct. 563, 58 L.Ed.2d 649 (1978), is controlling in this case and requires that we reverse the district court's holding that Price was not an employee within the meaning of the Act and therefore was entitled to recover under the FELA. In Graham, a claimant Jones was seeking compensation under the LHWCA for injuries sustained when he bumped against a machine which he was oiling. The machine was used in building ships. He was rated as a mechanic and belonged to the maintenance department of the employer. In holding that Jones was entitled to compensation under the LHWCA, we stated: 'Because Jone's maintenance was essential to keeping the shipyard's machinery in working order for the construction of ships, we conclude that he was a shipbuilder within the meaning of the Act.' Id. at 170.
>
> "In so holding, we cited with approval a Benefits

Review Board decision that is directly on point. In Bradshaw v. McCarthy, 3 BRBS 195 (1976), petition for review denied, 547 F.2d 1161 (3d Cir. 1977), a mechanic injured his back in a terminal while removing a tire from a forklift he was repairing. The forklift was used to unload ships and to load freight cars, tractors, and trailers. In holding that the claimant was an employee as defined in the Act, the Board stated:

> Merely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. The maintenance and repair of longshoring machinery equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment.

Id. at 198. We can discern no significant distinction between the repair of machinery essential to the movement of maritime cargo and the painting of a structure essential to the loading and unloading of the same. Nor can we discern any significant distinction between oiling a machine used in building ships, as was the claimant in Graham, and painting a structure used in loading and unloading ships. There is no doubt that employees employed in 'taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area' are "employe(es)" within the meaning of the amended statute. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 267, 97 S.Ct. 2348, 2359, 53 L.Ed.2d 320 (1977). The holding in Graham that a maintainer of a shipbuilder's machinery is covered requires a holding here that a maintainer of a longshoreman's machinery be covered.

"We find no merit in the argument of plaintiff that the fact that the plaintiff was (1062) merely painting the structure housing the conveyor mechanism that transports the grain, rather than the mechanism itself, is sufficient to distinguish this case from Graham and Bradshaw. The Gallery involved here is just as

> essential to the actual loading and unloading of ships as the machine involved in Graham was to their building. We should add at this point that we also find persuasive the direction of Northeast Marine Terminal that we take an 'expansive view' of this 'remedial legislation'. 432 U.S. at 268, 97 S.Ct. at 2359.

It is apparent that the Fourth Circuit has adopted the expansive view that "maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment." Since Northeast Marine Terminal, the federal courts have consistently applied the "expansive view" in interpreting the meaning of a "person engaged in maritime employment" as that term is used in 33 U.S.C.

§ 902(3) of LHWCA, and, it appears no court has followed White.

Is White nevertheless binding upon this court under the principal of stare decises? Neither Graham (decided March 13, 1978) nor Price (decided April 9, 1980) followed White, the latter expressly declining so to do saying ((sic) at page 1062, "***and with respect simply disagree with White." There is no suggestion in any of the memoranda that the precise question is now before the United States Supreme Court.

With Northeast Marine Terminal and its progeny Graham and Price binding on the Federal district courts, for this court to follow White would further frustrate lack of uniformity between federal snd state court decisions governing the interpretation of the meaning of a federal statute (particularly affecting the Hampton Roads area where ship construction and repair, shipping and longshoring activities are common place), a result the court concludes is not intended by White in view of the subsequent decisions in Graham and Price. The court respectfully declines to follow White, concluding that Price is controlling.

The court is of the opinion that at the time of his injury, plaintiff was engaged in maritime employment, and, thus was an "employee" within the meaning of 33 U.S.C. § 902(3) of LHWCA and that his exclusive remedy against defendant is under LHWCA.

Accordingly, the court concludes that plaintiff is precluded from maintaining subject FELA action and that defendant's special plea is sustained and the action of plaintiff is dismissed from the docket with prejudice to plaintiff.

Having so concluded, it is not necessary to reach the issue of what, if any, effect plaintiff's acceptance of compensation payments from defendant under LHWCA has on his right to maintain the FELA action.

Counsel for defendant is required to prepare an appropriate sketch for order sustaining the special plea for the reasons set forth in the foregoing letter opinion and dismissing the action from the docket with prejudice to plaintiff, circulate same to counsel for plaintiff for endorsement, and, to the court for consideration and entry.

Very truly yours,

/s/ J. Warren Stephens

Judge

OPPOSITION BRIEF

(2)

Docket No. 87-1979

Supreme Court, U.S.
FILED
JUL 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1987

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

V.

NANCY SCHWALB AND WILLIAM McGLONE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

C. Gerard Thompson
MOODY, STROPLE AND KLOEPPEL, LTD.
Commerce Bank Building, Suite 300
500 Crawford Street
Portsmouth, Virginia 23704
(804) 393-4093

Counsel for Respondents

3+1pp

QUESTIONS PRESENTED

I. Is an unskilled railroad laborer who sweeps coal from coal piers and does not perform traditional longshoring activities a "maritime employee" under the Longshoremen's and Harbor Workers' Compensation Act?

II. Will the extension of the Longshoremen's and Harbor Workers' Compensation Act to the respondents promote the legislative concerns of Congress that prompted the 1972 and 1984 amendments to the Longshoremen's and Harbor Workers' Compensation Act?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Jurisdiction 1

Statutes Involved 2

Statement of Facts 2

Argument

I. RESPONDENTS ARE RAILROAD WORKERS, WHO DO NOT PERFORM TRADITIONAL LONGSHORING ACTIVITIES, AND ARE NOT MARITIME EMPLOYEES. 4

II. THE JUDGMENT OF THE VIRGINIA SUPREME COURT IMPLEMENTS THE CONGRESSIONAL PURPOSES IN THE 1972 AMENDMENTS. 8

Conclusion 20

Certificate of Service 22

TABLE OF AUTHORITIES

	PAGE
Director, Office of Worker's Compensation Programs, United States Department of Labor v. Perini North River Associates 459 U.S. 297 (1983)	16-17,21
Herb's Welding, Inc. v. Gray 470 U.S. 414 (1985)	7,17-19,21
Nacirema Operating Company v. Johnson 396 U.S. 212 (1969)	8,9,17
Northeast Marine Terminal Company, Inc. v. Caputo 432 U.S. 249 (1977)	10-12,21
P. C. Pfeiffer Co., Inc. v. Ford 444 U.S. 69 (1979)	5,13-14,21
Sun Ship, Inc. v. Pennsylvania 447 U.S. 715 (1980)	14-16,21
Wilkerson v. McCarthy 366 U.S. 53 (1949)	4

STATUTES

	PAGE
28 U.S.C. § 1257(3)	1
33 U.S.C. § 902(3)	2,6,13
33 U.S.C. § 903(a)	6,12
33 U.S.C. § 905(a)	2
45 U.S.C. § 51 *et seq.*	2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-1979

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB,
Respondent.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner

v.

WILLIAM McGLONE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

The jurisdiction of this Court is involved under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

These cases involve the application of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 902(3) and 905(a) and the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.

STATEMENT OF FACTS

On January 11, 1983, Nancy Schwalb was injured on Pier 14 at Newport News, Virginia. She was walking to the truncheon rollers when she fell and struck her head. A fellow railroad laborer, Ben Gathers, found her on the walkway between 1:30 a.m. and 2:00 a.m. on January 12, 1983. Schwalb was bleeding from the nose and ear and has suffered seizures since the accident. She has not returned to work.

William C. McGlone, a laborer with the Chesapeake and Ohio Railway Company since 1970, injured his right arm during cleanup efforts on the defendant's property in Newport News, Virginia. His employment duties included the cleaning of bathrooms, bunkhouses, cabooses, engines and piers.

On February 1, 1983, Mr. McGlone' supervisor, Robert Layne, directed him to clean the area below main conveyor belt number three. Though Mr. McGlone requested the belt be shut down, Robert Layne rejected his request and instructed him to clean the debris from the concrete pier below the moving conveyor belt. Mr. McGlone complied with this order and proceeded to clean the debris. The defective belt caught his right arm and nearly severed it. He sustained a sixty percent (60%) loss of the use of the right arm and is permanently disabled from railroad employment.

ARGUMENT

I. RESPONDENTS ARE RAILROAD WORKERS, WHO DO NOT PERFORM TRADITIONAL LONGSHORING ACTIVITIES, AND ARE NOT MARITIME EMPLOYEES.

Respondents brought separate actions in Newport News and Portsmouth, Virginia to recover for on-the-job personal injuries. As other railroad employees have for 80 years, the respondents invoked the Federal Employers' Liability Act (FELA). The FELA has been specially enacted for railroad workers "to put on the railroad industry some of the cost for legs, eyes, arms and lives which it consumes in its operations". Wilkerson v. McCarthy, 366 U.S. 53 at 68 (1949).

Although the petitioner paid respondent McGlone $2,000.00 for a 1982 accident, which occurred in the same area of Newport News, Virginia, pursuant to the FELA, it now wishes to prohibit the respondents for asserting their traditional remedies under the FELA. The petitioner interposes the LHWCA as a bar to respondents' FELA claim and demand for jury trials.

The applicability of the LHWCA depends upon the nature of the respondents' activities. P. C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 at 82 (1979). The respondents did not load any coal aboard ships or the conveyor belts. They, in fact, were specifically prohibited from loading but were required to sweep spilled coal into piles. Their other duties included cleaning up bathrooms, bunkhouses, cabooses, engines and other railroad equipment.

In 1972, Congress amended the LHWCA and enumerated a two-pronged test. The test included a situs test and a status test. Section 903(a) of the Act sets forth the situs test where a longshoreman's claim must occur. It states:

> Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel). 33 U.S.C. § 903(a).

Section 902 of the Act defines the status test, that is, the status an employee must occupy before the LHWCA applies. It states:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker, ... 33 U.S.C. § 902(3).

Before the LHWCA may be applied to the respondents, they must sustain injuries upon the navigable waters of the United States and be engaged in maritime employment. The LHWCA does not define the term "maritime employment", nor does compliance with the situs test support or demonstrate compliance with the status requirement. See, Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985).

The respondents' duties never required their presence aboard ship, nor did they require their assistance in the unloading or loading of cargo. Rather, they swept or collected debris that fell from the conveyor belts. They did not operate any machinery in the loading or unloading process, nor did they operate any tool or equipment used in the loading or unloading process. Their duties possessed no significant relationship to the loading or unloading of cargo and do not involve traditional maritime activities. Therefore, the respondents do not meet the status test and are not "maritime employees".

II. THE JUDGMENT OF THE VIRGINIA SUPREME COURT IMPLEMENTS THE CONGRESSIONAL PURPOSES IN THE 1972 AMENDMENTS.

Before 1972, the LHWCA provided coverage to employees injured upon the navigable waters of the United States. This Court in Nacirema Operating Company v. Johnson, 396 U.S. 212 (1969) limited federal coverage to employees injured in or upon the navigable waters of the United States. In essence, a one-part or single status requirement determined the availability of federal compensation. Longshoremen received federal benefits only if their injuries occurred upon the navigable waterways.

In Nacirema, this Court denied LHWCA compensation to three workers who were attaching cargo from railroad cars located on piers to ships' cranes. When the cargo swung back, it knocked them onto the pier or against the side of a railroad car. Although one man died and the other two were injured, they did not receive compensation under the LHWCA. If they had fallen into the river or navigable waterway, the injured men would have received benefits under LHWCA.

In response to the inequitable and fluctuating compensation scheme, Congress amended the LHWCA in 1972. Congress replaced the previous status requirement with a two-pronged test. The prongs included: (1) a situs requirement and (2) a status requirement. The situs language greatly expanded the scope or geographical limits of the LHWCA, but the status language imposed a new limitation upon injured workers. Under the status test, a person must be engaged in "maritime employment" to receive federal compensation benefits.

In the years following the 1972 amendments to the LHWCA, this Court has had at least five opportunities to review the amendments. In Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249 (1977), this Court extended coverage to Ralph Caputo, a member of the regular longshoring gang, and Carmelo Blundo, a checker in Brooklyn, New York. Caputo worked as a terminal laborer and normally loaded or unloaded containers, barges and trucks. He was injured while rolling a dolly loaded with cheese into a consignee's truck.

Blundo, as a checker, was responsible for checking and recording cargo as it was loaded onto or unloaded from vessels, barges or containers. He slipped on some ice on the pier while marking containerized cargo.

Under pre-1972 law, both employees would not have received compensation under the LHWCA, but, under the 1972 amendments, they did. The Court stated:

> The 1972 amendments were the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it. The main concern of the 1972 amendments was not with the scope of coverage but with accommodating the desires of three interested groups: (1) Ship owners who were discontented with the decisions allowing many maritime workers to use the doctrine of 'seaworthiness' to recover full damages from ship owners regardless of fault; (2) Employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended

> exclusivity of the compensation remedy; and (3) Workers who wanted to improve the benefit schedule deemed inadequate by all parties. Id. at 261.

Congress sought to meet these desires through the 1972 amendments. Congress broadened the definition of "navigable waters of the Unites States" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel". 33 U.S.C. § 903(a).

Congress simultaneously amended the definition of the person covered by the Act and added the requirement that an injured worker be "engaged in maritime employment" which it defined to include "any longshoreman or any other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder and shipbreaker, ..." 33 U.S.C. § 902(3). Though Caputo and Blundo were not upon the navigable waterways when injured, they clearly fit the expanded situs definition and were engaged in the handling of cargo. Consequently, they were entitled to compensation.

In P. C. Pfeiffer Company, Inc. v. Ford, 444 U.S. 69 (1979), this Court affirmed longshoremen's benefits for Diverson Ford, a warehouseman, and William Bryant, a cotton header. Although neither was injured upon the navigable waterway as defined before the 1972 amendments, both were "engaged in the type of duties that longshoremen perform in transferring goods between ship and land transportation." Id. at 81. This Court concluded the explicit use of the terms "longshoremen" and "other persons engaged in longshoring operations" demonstrated that workers doing tasks traditionally performed by longshoremen were within the purview of the 1972 Act. Id. at 82.

This Court in Pfeiffer acknowledged one of the reasons Congress expanded coverage in 1972. The advent and proliferation of containerization had shifted much of the loading and unloading tasks from aboard ship to land. To deny access to the LHWCA because a worker fortuitously sustained injuries on piers or other land based structures rather than water severely and unfairly limited compensation for traditional longshoremen's work.

In Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980), this Court allowed employees to apply for and recover from their state workmen's compensation scheme and the federal workmen's compensation scheme. The 1972 amendments to the LHWCA deleted a previous requirement in which recovery was dependent upon the unavailability of compensation by state law. The deletion of this requirement evidenced the concurrent nature and jurisdiction of federal and state compensation laws.

The Court concluded "if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for worker's injuries than under an exclusively federal compensation system". Id. at 724. Congress was not concerned with the disparity between adequate federal benefits and superior state benefits. Rather, the quid pro quo to the employers for the landward extension of the LHWCA by the 1972 amendments was simply the abolition of the longshoremen's unseaworthiness remedies. This Court noted with some interest that the Congressional Reports dwell upon the rejection of the unseaworthiness action and do not mention the pre-emption of state remedies. Id. at 24 and 25. Similarly, Congress did not mention pre-emption of the FELA or the application of the LHWCA to railroad workers.

In Director, Office of Worker's Compensation Programs, United States Department of Labor v. Perini North River Associates, 459 U.S. 297 (1983), the Supreme Court allowed Raymond Churchill, an employee of Perini, to receive benefits under the LHWCA. Churchill was injured while working a barge in navigable waters. This Court again reviewed the historical events preceding the 1972 amendments. It specifically stated Congress responded to its decision in Nacirema in which the Court held the LHWCA did not extend to longshoremen whose injuries occurred on a pier attached to land.

The Congressional Record during the debate on the 1972 amendments was also reviewed, and the Court enumerated the purposes of the 1972 amendments. They were: (1) To raise the amount the amount of compensation available under the LHWCA, (2) To extend coverage of the Act to include certain contiguous land areas, (3) To eliminate the longshoremen's strict liability seaworthiness remedy against ship owners, (4) To eliminate shipowner's claims for indemnification from stevedores, and (5) To promulgate certain administrative reforms. Perini at 313.

In Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985), this Court reversed the United States Court of Appeals for the Fifth Circuit and denied LHWCA coverage to Robert Gray, a welder. Gray worked for Herb's Welding, Inc., off the Louisiana coast. While welding a gas flow line on a fixed platform located in Louisiana waters, he burnt through the bottom of a line and an explosion occurred. He injured his knees and sought benefits under the LHWCA for wages, disability and medical expenses. The Fifth Circuit granted compensation and concluded that offshore drilling is maritime commerce and anyone performing such tasks was employed in maritime employment for LHWCA purposes.

In rejecting the Fifth Circuit's expansive view of maritime employment, this Court stated "Congress did not seek to cover all those who breathe salt air". Id. at 423. Rather, Congress' purpose was to cover those workers engaged in traditional maritime employment. "The amendments were not meant 'to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.'" Id. at 424.

This Court noted that Gray was not involved in loading or unloading cargo. His duties contained nothing inherently maritime and could be performed on land. This Court emphasized it has "never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation". Id. at 424.

The Virginia Supreme Court, like the United States Supreme Court, has required an employee to meet both tests, i.e. situs and status, before the LHWCA applies. Similarly, the Virginia Supreme Court examines these requirements individually and has refused to extend the LHWCA to "all those who breathe salt air". Rather, the Virginia Supreme Court denied the railroad's efforts to invoke the LHWCA because respondents Schwalb and McGlone did not perform traditional maritime activities. Their sole function was a janitorial one in which they cleaned debris from the piers, buildings, cabooses, and railroad cars.

CONCLUSION

Respondents are employees of the Chesapeake and Ohio Railway Company. As railroad employees, they performed janitorial services in the cleaning of bathrooms, bunkhouses, cabooses, engines and piers. They did not and have never performed traditional longshoremen's or maritime duties; nor have they participated in loading or unloading cargo. To extend LHWCA coverage to the respondents would deny them a superior remedy under the FELA, would allow the railroad to settle small claims under the FELA but minimize their losses on larger claims through the application of the LHWCA, would defeat the specific purposes of the 1972 amendments and would violate the principles and findings in Caputo, Pfeiffer, Sun Ship, Perini, and Herb's Welding, Inc. Respondent respectfully requests that the petition for certiorari be denied and that the cases be remanded for trial upon their merits.

Respectfully submitted,

NANCY SCHWALB and
WILLIAM McGLONE

By________________
Of Counsel

C. Gerard Thompson
MOODY, STROPLE AND KLOEPPEL, LTD.
Commerce Bank Building, Suite 300
500 Crawford Street
Portsmouth, VA 23705-1138

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of this Brief in Opposition to Petition for a Writ of Certiorari upon the petitioner, Chesapeake and Ohio Railway Company, at the office of its counsel of record, William T. Prince, Williams, Worrell, Kelly & Greer, P.C., 600 Crestar Bank Building, Norfolk, VA 23510, pursuant to the requirement of Rules 28 and 33 of the Rules of the Supreme Court of the United States, by depositing the same in a United States mailbox, with first class postage, pre-paid, on or before July 2, 1988.

I further certify that I am a member of this Court and that all parties required to be served have been served on or before July 2, 1988.

C Gerard Thompson

C. Gerard Thompson
Counsel for Respondents

APPENDIX

APPENDIX INDEX

SUBJECT	PAGE
1. Settlement and Final Release of All Claims dated August 6, 1982, by and between the Chesapeake and Ohio Railway Company and William C. McGlone for an accident at or near Newport News, Virginia on or about July 9, 1982	1A

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

SETTLEMENT AND FINAL RELEASE
OF ALL CLAIMS
Read Carefully Before Signing

The undersigned acknowledges the receipt of Two Thousand & 00/100 Dollars ($2,000) from THE CHESAPEAKE & OHIO RAILWAY COMPANY in full settlement and satisfaction of all claims, demands, and causes of action hereinafter mentioned, and in consideration of said payment hereby RELEASES and forever discharges THE CHESAPEAKE & OHIO RAILWAY COMPANY, its agents, servants and employees from all claims, demands, and causes of action which the undersigned have or might have against them or any of them arising out of or in any way connected with personal injuries received at or near Newport News, Virginia, on or about July 9, 1982. This settlement is made upon my representation that I have not received any supplemental sickness benefit payments because of this accident and if I do receive any hereafter because of this accident, I agree to reimburse said Railroad Company the amount so received.

Both the undersigned and the Company do now acknowledge that the injuries which the undersigned sustained may be permanent and progressive; that recovery may be uncertain and indefinite and that injuries, damages and losses may not now be fully known and may be more numerous and more serious than now believed. In making this SETTLEMENT AND FINAL RELEASE the undersigned relies wholly upon his or her own judgment and has not been influenced to any extent whatever by any representation or statement of the claims agent, doctors, or other representatives of the Company. The undersigned admits that no promise or agreement has been made to him or her, and that this RELEASE contains the entire agreement between the parties hereto and that all the terms of this RELEASE are important parts of this contract and are binding upon all parties.

The word "injuries", where used in this SETTLEMENT AND FINAL RELEASE, include all injuries which are unknown as well as injuries which are known and includes all consequences of such injuries which may hereafter develop as well as consequences now developed. This settlement is intended to be final, the undersigned taking his or her chances that the injuries may prove to be more serious than now believed and the other parties taking their chances that the injuries may prove to be less serious than now believed.

It is further understood and agreed that this is a settlement by compromise of a disputed claim and that the payment made is not to be construed as an admission of liability, all liability being expressly denied.

release
/s/ I have read and understand this relase.
W.C. Mc

SIGNED and SEALED at N.N. VA., on this 6 day of AUG, 1982

/s/ William C. McGlone
(SEAL)

Witnesses Sign Here W. B. Swain

F. L. Royall

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JAN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

③ ③

Nos. 87-1979 and 88-127

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

ROBERT T. GOODE, JR.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General
DAVID L. SHAPIRO
Deputy Solicitor General
CHRISTINE DESAN HUSSON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
CHARLES I. HADDEN
Deputy Associate Solicitor
CHRISTINE L. OWENS
Attorney
Department of Labor
Washington, D.C. 20210

23 pp

QUESTION PRESENTED

Whether "employee[s]" engaged in "maritime employment" under Section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), include not only those workers who actually load or unload cargo but also all workers on a covered site who perform work that is an essential element or integral part of the process of loading or unloading.

TABLE OF CONTENTS

Page

Statement 1

Discussion 6

Conclusion 18

TABLE OF AUTHORITIES

Cases:

Caldwell v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980) 16

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 17

Conti v. *Norfolk & W. Ry.*, 566 F.2d 890 (4th Cir. 1977) 16

Director, Office of Workers' Compensation Programs v. *Perini North River Assocs.*, 459 U.S. 297 (1983) 6, 8

Garvey Grain Co. v. *Director, Office of Workers' Compensation Programs*, 639 F.2d 366 (7th Cir. 1981) 14

Harmon v. *Baltimore & O.R.R.*, 741 F.2d 1398 (D.C. Cir. 1984) 14, 16

Herb's Welding, Inc. v. *Gray*, 470 U.S. 414 (1985) 5, 10, 13

Hullinghorst Indus., Inc. v. *Carroll*, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982) 14

Morrison-Knudsen Constr. Co. v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624 (1983) 17

NLRB v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) 10

Newport News Shipbuilding & Drydock Co. v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978) 13

Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977) 5, 6, 8, 9, 10, 11, 12, 17

P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 (1979) 6, 7, 8, 9, 10, 12, 13

Pennsylvania R.R. v. *O'Rourke*, 344 U.S. 334 (1953) 16

Price v. *Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980) 4, 5, 14, 16

Cases – Continued: Page

Prolerized New England Co. v. *Benefits Review Bd.*, 637 F.2d 30 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981) . . . 14

Prolerized New England Co. v. *Miller*, 691 F.2d 45 (1st Cir. 1982) . . . 14

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) . . . 17

Ryan Stevedoring Co. v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956) . . . 8

Sea-Land Services, Inc. v. *Director, Office of Workers' Compensation Programs*, 685 F.2d 1121 (9th Cir. 1982) . . . 14, 15

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85 (1946) . . . 8

Sun Ship, Inc. v. *Pennsylvania*, 447 U.S. 715 (1980) . . . 7

Verderane v. *Jacksonville Shipyards, Inc.*, 20 Ben. Rev. Bd. Serv. (MB) 62 (1984) . . . 17

Vogelsang v. *Western Maryland Ry.*, 670 F.2d 1347 (4th Cir. 1982) . . . 16

Voris v. *Eikel*, 346 U.S. 328 (1953) . . . 9

Weyerhaeuser Co. v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976) . . . 5, 15

White v. *Norfolk & W. Ry.*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977) . . . 4, 14, 15

Wuellet v. *Scappoose Sand & Gravel Co.*, 18 Ben. Rev. Bd. Serv. (MB) 108 (1986) . . . 17

Zenith Radio Corp. v. *United States*, 437 U.S. 443 1978) . . . 17

Statutes:

Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* . . . 3

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* . . . 3

§ 2(3), 33 U.S.C. 902(3) . . . 4, 8, 9, 17

§ 2(3), 33 U.S.C. 902(3) (Supp. IV 1986) . . . 4, 11

§ 3(a), 33 U.S.C. 903(a) . . . 8

§ 5, 33 U.S.C. 905 . . . 16

Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 27(d)(1), 98 Stat. 1654 . . . 3

Miscellaneous: Page

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972) . . . 8, 9, 10

H.R. Rep. No. 570, 98th Cong., 1st Sess. (1983) . . . 11

S. Rep. No. 1125, 92d Cong., 2d Sess. (1972) . . . 8, 9-10

S. Rep. No. 81, 98th Cong., 1st Sess. (1983) . . . 10

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1979

CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE

No. 88-127

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

ROBERT T. GOODE, JR.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners, Chesapeake and Ohio Railway Company (C&O) and Norfolk and Western Railway Company (N&W), operate coal loading terminals in the Hampton Roads area of Virginia. C&O's terminal abuts the James River (87-1979 Pet. 7), while N&W's facility, known as Lambert's Point, adjoins the Elizabeth River (88-127 Pet. 7). Petitioners' freight trains transport coal mined inland for loading onto ships docked at the terminals' piers. Upon arrival, the coal-laden railway cars re-

main in the terminals' "barney" yards until the shiploading process begins. Pet. App. 8A-9A, 46A.[1]

The process of loading coal into ships' holds is highly mechanized and, in all material respects, identical at both petitioners' terminals. When shiploading begins, railway cars move one-by-one from the barney yards and onto "dumpers" at the land end of the piers. A mechanical device called a "retarder" stops each loaded coal car at the correct position on the dumper. Next, other mechanical devices lift and rotate the car, so that its contents drop through a hopper to conveyor belts that feed the coal directly onto the waiting ships. After unloading, the cars roll back to the terminals' holding yards, from which they are eventually sent inland. Barring mechanical failure or other incident, the coal loading process is continuous from the time a car leaves the barney yard until it returns, empty, to the holding yard. Pet. App. 3A-4A, 46A-48A; 87-1979 Pet. 7-9; 88-127 Pet. 8-9.

The respondents in No. 87-1979, Nancy J. Schwalb and William McGlone, were laborers employed by C&O to perform general cleaning at its terminal. Though each had varied duties, they both were frequently required, during the actual shiploading process, to clear away coal that spilled from the conveyor belts and the "trunnion rollers," the devices at the ends of the dumper that enable it to rotate suspended railway cars. Failure to clear away this "trash coal" results in malfunction of the shiploading equipment, thus halting the loading process. Pet. App. 3A-4A, 20A-21A, 23A-24A; 87-1979 Pet. 9. While Schwalb and McGlone easily could have replaced the trash coal on the conveyor belts, applicable union agreements prohibited them from doing so; rather, laborers from a different department performed that task (Pet. App. 4A; 87-1979 Pet. 9-10; 87-1979 Br. in Opp. 5).

The respondent in No. 88-127, Robert J. Goode, Jr., was a machinist for N&W who worked in the Motive Power Department at Lambert's Point.[2] That department's function was to maintain and operate the coal facility, with machinists in the Department devoting the majority of their time to maintaining and repairing loading equipment and machines. Pet. App. 47A-49A, 52A.

---

[1] The contents of the appendices to the petitions in each case are essentially identical, except for their order. Therefore, for ease of reference, we refer only to the Appendix in No. 87-1979, cited as "Pet. App."

Schwalb sustained a serious head injury on January 11, 1983, when she fell while walking to clear trash coal from the trunnion rollers (87-1979 Pet. 10-11; 87-1979 Br. in Opp. 2). McGlone was injured on February 1, 1983, as he was attempting to clear away trash coal beneath a moving conveyor belt (87-1979 Pet. 10; 87-1979 Br. in Opp. 3). Goode was injured on February 11, 1985, while repairing the retarder located on one of the dumpers at Lambert's Point (88-127 Pet. 9-10; 88-127 Br. in Opp. 2-3). Each respondent brought a timely action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, in the appropriate circuit court of the State of Virginia (Pet. App. 2A, 88-127 Br. in Opp. 2). C&O filed special pleas to the courts' jurisdiction, contending that the respondents' exclusive remedy was under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*[3] N&W moved to dismiss on the same basis. Pet. App. 19A, 23A, 45A.

2. The courts for the Third Judicial Circuit (*McGlone*), Fourth Judicial Circuit (*Goode*), and Seventh Judicial Circuit (*Schwalb*) of Virginia each decided that the LHWCA applied to respondents' claims, sustained petitioners' jurisdictional challenges, and dismissed the FELA actions (Pet. App. 31A-34A, 45A). In each case, the court found no serious dispute that the respondents satisfied the LHWCA's "situs" requirement by working in a statutorily covered geographical area (Pet. App. 20A, 24A-25A, 56A), and thus focused principally on whether

---

[2] N&W employs machinists throughout its rail system, assigning them to different sites and different jobs on the basis of seniority (Pet. App. 48A-49A; 88-127 Br. in Opp. 5-6).

[3] The Longshoremen's and Harbor Workers' Compensation Act was retitled by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. 98-426, § 27(d)(1), 98 Stat. 1654.

the respondents were "employee[s]" as defined by Section 2(3) of the Act, 33 U.S.C. 902(3) (1982 & Supp. IV 1986).

In resolving this issue of employee status, the circuit courts in the *McGlone* and *Goode* cases explicitly acknowledged a conflict between the restrictive approach to the question that the Virginia Supreme Court followed in *White* v. *Norfolk & W. Ry.*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977), and the more expansive standard adopted by the federal courts of appeals in such decisions as *Price* v. *Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980) (Pet. App. 25A-29A, 53A). The courts viewed the Virginia Supreme Court's *White* standard as confining LHWCA coverage to those workers on the situs who were "directly involved" in the loading of cargo (*id.* at 26A, 52A-53A). By contrast, the courts believed, the prevailing standard among the federal courts of appeals is considerably broader, encompassing all workers on the situs whose jobs comprise "an essential element in the loading and unloading of the vessels" (*id.* at 27A-28A, 54A). As the *McGlone* court interpreted it, the federal standard does not require an employee to be involved "in the actual loading of ships," if the maintenance work the employee performed "was essential to the movement of maritime cargo" (*id.* at 27A). The *McGlone* and *Goode* courts resolved this conflict between state and federal court interpretations against adherence to the Virginia Supreme Court's test; in their view, following *White* "would be to interpret a Federal law contrary to all of the decisions of the Federal courts" (*id.* at 28A), and the test formulated by the federal courts was, in fact, the proper test (*id.* at 53A-54A).

Applying the federal courts' status test, the Virginia circuit courts concluded that the LHWCA covered the respondents because they performed tasks essential to the loading of coal at petitioners' terminals. McGlone's cleaning duties were essential because the failure to clear away coal that had fallen from the belts "would eventually interfere with the loading operation and bring it to a halt" (Pet. App. 24A). Similarly, Schwalb's cleaning duties conferred LHWCA coverage because "if the spilled coal was not removed * * * it could have haulted [*sic*] the process of loading the coal aboard the vessels" (*id.* at 21A). And Goode was an employee under the LHWCA because he maintained and repaired equipment and machines "directly and solely related to the loading and unloading operation" (*id.* at 52A), and was thus "involved in the essential elements of loading and unloading" (*id.* at 51A, citing *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 (1985)).[4]

3. The Supreme Court of Virginia consolidated Schwalb's and McGlone's appeals and reversed (Pet. App. 1A-18A). Although acknowledging that the United States Court of Appeals for the Fourth Circuit had applied the LHWCA to a painter who did not actually handle cargo but who had maintenance duties essential to the "entire [loading] process" (*id.* at 12A (quoting *Price,* 618 F.2d at 1062 n.4)), and agreeing here that the failure to remove "trash coal" could interrupt that process (Pet. App. 4A), the Virginia court rejected the *Price* court's reasoning and conclusion (*id.* at 12A, 16A-17A), refused to adopt the "overall process" standard and adhered, instead, to the restrictive test set out in *White* (*id.* at 16A-17A). Under that test, the court held, workers must show that their " 'own work and employment' " bears " 'a realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters,' " to bring themselves within the LHWCA (*id.* at 10A-11A, quoting *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976)). Reading this Court's "essential elements of [loading or] unloading" language in *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977), to limit LHWCA coverage only to those employees actually "engaged in the handling of cargo" (Pet. App. 14A (quoting 432 U.S. at 267)), the Virginia Supreme Court concluded that "the [*Northeast Marine Terminal*] 'essential elements' standard is more nearly akin to the [*White*] 'significant relationship' standard * * * than the 'overall

---

[4] The circuit court in *Goode*, explicitly concluding that the federal standard should prevail over the state's *White* standard to the extent that the standards differed, nevertheless held that the activities of Goode qualified him for coverage under the *White* test as well (Pet. App. 53A).

process' construction" (Pet. App. at 16A). Without considering how essential their duties were to the overall loading process, the court held that since Schwalb and McGlone performed "purely housekeeping and janitorial tasks," they "were not statutory employees as defined in the LHWCA" (*id.* at 17A). Application of the *White* test thus required reversal of the circuit courts' judgments. Subsequently, relying on its opinion in *Schwalb*, the Virginia Supreme Court reversed the judgment in *Goode* as well (Pet. App. 58A-59A).[5]

DISCUSSION

These cases present this Court with an excellent opportunity to examine the scope of landward coverage under the "status" provision of the 1972 amendments to the Longshore and Harbor Workers' Compensation Act. The Court has faced the question twice before, see *P.C. Pfeiffer Co.* v. *Ford,* 444 U.S. 69 (1979); *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977), each time finding the employees covered because "they were 'engaged in longshoring operations,' and thus fit one of the categories explicitly enumerated by Congress as part of 'maritime employment.' " *Director, Office of Workers' Compensation Programs* v. *Perini North River Assocs.,* 459 U.S. 297, 318 n.27 (1983). As the Court has recognized (*ibid.*), in neither case did it determine that the concept of "maritime employment" required "an examination into whether the employment had a 'direct' or 'significant relationship to navigation or commerce.' "

---

[5] The Court did not consider, as an independent ground on which it could sustain the lower court's holding, the fact that Goode's duties as a pier mechanic at times involved work "over the water" (88-127 Br. in Opp. 6; 88-127 Pet. App. 26A, 33A), and that such work therefore may have qualified Goode as a covered employee under *Northeast Marine Terminal,* 432 U.S. at 273 (post-1972 LHWCA meant to cover "amphibious workers" or those who spent "at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity") and *Director, Office of Workers' Compensation Programs* v. *Perini North River Assocs.,* 459 U.S. 297, 311-312 (1983) (workers injured on navigable waters before 1972 covered under LHWCA without regard to duties performed; post-1972 Act covers all previously covered).

The Supreme Court of Virginia has attempted to create a "significant relationship" test here, one that is severely limited in scope. The Virginia court's decisions in *White* and the instant cases make that limitation clear: the court's test essentially requires workers claiming coverage because of stevedoring or similar activities to demonstrate that they are actually loading or unloading maritime cargo (either by physically handling the cargo or by manipulating machinery used for that purpose) in order to bring themselves within the LHWCA's ambit. This test conflicts with the expansive interpretation of the LHWCA's status provision suggested by its statutory language and legislative history, accorded that provision by this Court, and uniformly applied by the federal courts of appeals, the Department of Labor, and the Benefits Review Board (BRB). The conflict creates uncertainty over the proper test for employment status that invites forum-shopping among injured workers, implicates the Department of Labor's administration of the LHWCA program, and potentially impinges on the rights and interests of employers and employees alike.[6] These results frustrate Congress's intent that "a simple, uniform standard of coverage" apply under the LHWCA. Pfeiffer, 444 U.S. at 83. Given the practical importance of the issue and the disagreement among the lower courts addressing it, review by this Court is warranted.

1. The language and legislative history of the 1972 amendments to the LHWCA indicate that a broad reading of the

---

[6] In this case, because the FELA provides potentially lucrative, albeit uncertain, relief if the LHWCA does not cover respondents, a finding of no LHWCA coverage may well inure to their immediate financial benefit. The possible advantage presented by a "no LHWCA coverage" finding to these respondents, however, does not illuminate the inquiry into the scope of the LHWCA's status requirement. In numerous other situations, to preclude coverage of claimants who, like respondents, perform tasks integral to the loading and unloading process, would be to consign them to "the paucity of relief under *state* compensation laws." *Sun Ship, Inc.* v. *Pennsylvania,* 447 U.S. 715, 723 (1980). That result would be plainly inconsistent with Congress's intent in its 1972 landward extension of the LHWCA, to alleviate the problem of inadequate state remedies (*ibid.*).

coverage provided by the statute is required. These amendments were intended to remedy several problems. First, Congress sought to eliminate circumvention of the LHWCA compensation system through resort to an action for unseaworthiness.[7] See S. Rep. No. 1125, 92d Cong., 2d Sess. 1-2, 5-12 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1-8 (1972); *Perini*, 459 U.S. at 313; *Northeast Marine Terminal*, 432 U.S. at 260-261. In addition, Congress sought to expand the Act's scope; it wanted to remedy a coverage anomaly that limited longshore and harbor workers to recovering LHWCA benefits for work-related injuries sustained on navigable waters and left those who sustained similar injuries on the adjoining land without an LHWCA remedy. See S. Rep. No. 1125, *supra*, at 1, 12-13; H.R. Rep. No. 1441, *supra*, at 10-11; *Perini*, 459 U.S. at 306-312; *Northeast Marine Terminal*, 432 U.S. at 256-265; *Pfeiffer*, 444 U.S. at 72-73.

Congress effected the coverage change through two specific amendatory clauses. First, it modified the Act's "situs" requirement, expanding the definition of "navigable waters" under Section 3(a), 33 U.S.C. 903(a), to include " 'any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel.' " *Northeast Marine Terminal*, 432 U.S. at 263. This case involves the second of the amendatory clauses, the new "status" requirement Congress added to Section 2(3), 33 U.S.C. 902(3), "to describe affirmatively the class of workers [it] desired to compensate." *Northeast Marine Terminal*, 432 U.S. at 264. Under the amended status test, LHWCA coverage extends to injured workers "engaged in maritime employment," including specifically "any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker * * *." 33 U.S.C. 902(3).

Congress did not define "maritime employment," "longshoreman," or "longshoring operations" in either the Act or its legislative history. See *Northeast Marine Terminal*, 432 U.S. at 265.[8] However, the broad language of the status test itself suggests that the courts should take "an expansive view of [its] extended coverage." *Id.* at 268.

The remedial purpose of the statute reflected in the legislative history further supports an expansive view of the Act's coverage. *Northeast Marine Terminal*, 432 U.S. at 268 (citing *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953)). As chronicled by this Court (see 432 U.S. at 268-273), Congress decided to extend the coverage of the Act shoreward because of two main concerns. First, pre-1972 benefits under the LHWCA extended only to those longshore and harbor workers who were injured over navigable waters; injuries occurring on land were covered by state workers' compensation laws. The result was "a disparity in benefits payable * * * for the same type of injury depending on which side of the water's edge and in which State the accident occurs." S. Rep. No. 1125, *supra*, at 12; H.R. Rep. No. 1441, *supra*, at 10. Moreover, the disparity between federal benefits and generally lower state benefits was to widen after the passage of the federal benefit reforms contained in the 1972 amendments. S. Rep. No. 1125, *supra*, at 12-13; H.R. Rep. No. 1441, *supra*, at 10; *Pfeiffer*, 444 U.S. at 83; *Northeast Marine Terminal*, 432 U.S. at 262. Second, Congress recognized that the realities of modern shipping practices, including containerization and other technological innovations, had moved much of the longshoring work it wished to protect onto the land. S. Rep. No. 1125,

---

[7] Prior to the 1972 amendments, a longshoreman or related worker could bring an unseaworthiness action for injury incurred on board a ship against the owner of that ship, and could do so even if the condition causing the injury had been the fault of the longshoreman or his employer. See, *e.g.*, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). The shipowner could then recover the damages paid to the worker from that worker's employer under theories of express or implicit warranty of workmanlike performance. See, *e.g.*, *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

[8] The Committee reports accompanying the Act posit only a single "typical example" of the new status requirement, which, though useful in identifying the outer bounds of coverage, clearly "does not speak to all situations." *Northeast Marine Terminal*, 432 U.S. at 266, 267.

supra, at 13; H.R. Rep. No. 1441, *supra,* at 10; *Northeast Marine Terminal,* 432 U.S. at 270.[9]

These concerns support a liberal construction of the Act's landward coverage – a construction that focuses on the *occupations* of those the Act seeks to protect instead of on the "fortuitous circumstance" of where they are injured (S. Rep. No. 1125, *supra,* at 13; H.R. Rep. No. 1441, *supra,* at 10; see *Pfeiffer,* 444 U.S. at 78-84; *Northeast Marine Terminal,* 432 U.S. at 272-273), and that makes allowance for changing technology (see *Northeast Marine Terminal,* 432 U.S. at 269-271). As this Court has articulated the functional approach of the status provision, all employees "involved in the essential elements of loading and unloading" meet the status requirement of the Act; employees are excluded if they are " '*not* engaged in the overall process of loading or unloading.' " *Herb's Welding, Inc.* v. *Gray,* 470 U.S. 414, 423 (1985) (quoting *Northeast Marine Terminal,* 432 U.S. at 267 (emphasis added)). Coverage thus extends to any worker "responsible for some portion of" the loading and unloading activity since he or she is "as much an integral part of the process * * * as a person who participates in the entire process." *Pfeiffer,* 444 U.S. at 82-83.

In 1984, Congress amended the status provision "to reaffirm the purposes of the 1972 jurisdictional changes, and in that light * * * [to exclude] certain fairly identifiable employers and employees" who, although at work on a covered situs, lack "a sufficient nexus to maritime navigation and commerce." S. Rep. No. 81, 98th Cong., 1st Sess. 25 (1983).[10] The amended provision excludes only certain narrow categories of employees more tenuously connected to maritime work than those involved

---

[9] The enormity of the change in the longshoring industry effected by containerization alone, and the difficulties that change engenders when it is necessary to identify "longshoring tasks" have been documented by this Court. See *NLRB* v. *International Longshoremen's Ass'n,* 447 U.S. 490 (1980) (concerning appropriate focus of work preservation agreement in longshoring industry under National Labor Relations Act).

[10] The 1984 amendments and their history are directly relevant to the instant case involving respondent Goode, who was injured on February 11, 1985 (88-127 Br. in Opp. 7).

here,[11] but excludes them *only* if they are eligible for state workers' compensation programs. 33 U.S.C. 902(3) (Supp. IV 1986).[12] Moreover, Congress in 1984 indicated that it considered coverage of employees under the Act appropriate either "because of the nature of the work which they do, or the nature of the hazards to which they are exposed." H.R. Rep. No. 570, *supra,* at 4. This broad approach clearly includes workers facilitating a loading process, who are subject to the same harbor-side risks as those actually handling cargo.

Thus, both the language of the status provision and the purposes expressed by Congress in 1972 and 1984 support a broad, functional approach to the landward coverage of the LHWCA, rather than the restrictive standard applied by the Supreme Court of Virginia.

2. The state court's standard is also inconsistent with the principles of coverage enunciated by this Court and followed by the lower federal courts.

a. In *Northeast Marine Terminal Co.* v. *Caputo, supra,* this Court first determined the reach of LHWCA coverage under the status provision of the 1972 amendments. The case involved two employees, a "checker" (the worker responsible for checking and recording cargo as it is loaded or unloaded) and a longshoreman who at the time of injury was working as a "terminal laborer" helping to load already-discharged cargo into consignees' trucks. After reviewing the history of the LHWCA with attention to Congress's continued efforts to provide uniform coverage to "amphibious workers" (432 U.S. at 256-265, 273), the Court concluded that the Act's status provision should be interpreted broadly and in functional terms. The Court held that the "checker" satisfied the status requirement because, although his longshoring functions had been somewhat changed by technology (the employee was checking the contents of a container on shore on the day of the accident), his work was "an integral part of the unloading process as altered by the advent of containerization." *Id.* at 271. The Court held that the "terminal laborer" also met the status requirement; since he spent some of his time in "indisputably longshoring operations" (*id.* at 273), the Act's "focus on occupations and its desire for uniformity" supported continuous coverage under the LHWCA (*id.* at 276).

---

[11] The amendments exclude from coverage, *inter alia,* "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work; * * * [or] employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance)." 33 U.S.C. 902(3) (Supp. IV 1986). Even these carefully limited exclusions "are intended to be narrowly construed." H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983).

[12] In the words of the House Report, workers not protected by state programs would "*remain* under the coverage of the Longshore Act," to whatever extent they were already covered by the Act's broad definition of maritime employment. H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983) (emphasis added).

The Court explicitly rejected restrictions that would have artificially curtailed its functional analysis. First, it denied that union membership should determine eligibility as a "longshoreman" under the Act, noting that "[t]he vagaries of union jurisdiction are unrelated to the purposes of the Act." *Northeast Marine Terminal,* 432 U.S. at 268 n.30. Second, the Court rejected a limitation not unlike that adopted by the Virginia court here. The Court held that the "point-of-rest" doctrine—according to which "stevedoring" was limited to loading or unloading operations seaward of the first "point of rest" on a pier or dock from which cargo is moved into vessels or removed for further transport ashore—was incompatible with the Act's objective of extending uniform coverage on an occupational basis. *Id.* at 275, 276.

This Court confirmed its expansive interpretation of the landward extension of coverage in *P.C. Pfeiffer* v. *Ford, supra,* where it found coverage for two workers, neither of whom loaded or unloaded material directly to or from boats.[13] The Court rejected any resurrection of the artificial distinctions imposed by union labels or the point-of-rest theory (444 U.S. at 81-82) and also rejected the creation of similar restrictions by employer "assignment policies" (*id.* at 83). Rather, the Court focused on the "nature of the activity" to which a worker could be assigned: it noted that "[l]and-based workers who do not handle containerized cargo also may be engaged in loading, unloading, repairing, or building a vessel" because "[p]ersons moving cargo directly from ship to land transportation are engaged in maritime employment * * * [and one] responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process" *Id.* at 80, 82-83 (citation omitted); see also *Herb's Welding,* 470 U.S. at 423.

Consistently with the rationale of these decisions, the courts of appeals uniformly view the question of whether employees are "engaged in maritime employment" from a functional perspective, focusing on the nexus between a worker's actual duties and the overall process of loading and unloading cargo.[14] This approach takes into account the reality of conventional longshoring operations: that maritime employment today is significantly affected by technology, job specialization, and the "vagaries of union jurisdiction." Thus, although using slightly varying terms, the courts of appeals have extended coverage under the Act to any employee on a covered situs whose actual duties comprise an "essential element" or "integral part" of the overall loading and unloading process, even if those duties do not themselves include physically or mechanically loading or unloading maritime cargo. This test specifically encompasses workers who, like respondents, engage in cleaning, maintenance, and repair of equipment used to load ships.[15]

---

[13] Ford was a "warehouseman" injured while fastening military vehicles (which had been unloaded from a vessel days before) to a railroad flatcar. He was prohibited from moving cargo either directly from a vessel to a point of rest in storage or to a railroad car, or directly from a shoreside point of rest onto a vessel, by union rules reserving such work for longshoremen. *Pfeiffer*, 444 U.S. at 71. Bryant was a "cotton header" injured while unloading cotton from its land transport by wagon into a pier warehouse. His loading activities were limited by union rules similar to those applied to Ford. *Id.* at 71-72.

[14] The courts take an identical tack in determining whether employees are "harbor-workers" engaged in ship repair, shipbuilding, and shipbreaking. See, *e.g.*, *Newport News Shipbuilding & Drydock Co.* v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978).

b. In holding that respondents were not employees under the LHWCA, the Virginia Supreme Court expressly rejected the courts of appeals' functional test and adhered, instead, to its earlier decision in *White* v. *Norfolk & W. Ry.*, *supra*. Pet. App. 17A. *White* limited coverage under the Act to those employees having a " 'realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters.' " 217 Va. at 832, 232 S.E.2d at 812 (quoting *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d at 961).[16] The *White* decision makes clear that the court views the "realistically significant relationship" test as requiring direct involvement in the physical process of loading and unloading cargo. Thus, although White's duties required him to maintain electrical equipment essential to the coal loading process, the court concluded that he lacked the requisite "realistically significant relationship to the loading of cargo on ships," because he was "not actually handling any cargo, either manually or mechanically," and "was not manipulating * * * any of the controls of the electrical mechanism, which furnished the power for this automated loading process." 217 Va. at 832-833, 232 S.E.2d at 813. Applying *White*, the court concluded here that respondents Schwalb and McGlone were not statutory employees because they also were not actually " 'engaged in the handling of cargo' " (Pet. App. 14A), notwithstanding that failure to clean trash coal from the rollers and belts would halt the loading process (*id.* at 4A) and that only the "vagaries of union jurisdiction"—specifically, union agreements covering various groups of workers at the terminal—prohibited Schwalb and McGlone from placing the coal back on the belts (*id.* at 4A). The court applied its narrow approach again when it ruled that respondent Goode was not an employee under the Act, although Goode's duties consisted largely of maintenance and repair of machinery and equipment used exclusively for coal loading in a terminal where loading apparently is almost entirely automated (see *id.* at 46A-48A).

We believe that the Supreme Court of Virginia erred in reading this Court's opinions to direct so restrictive a standard for landward coverage under the LHWCA. The Virginia court reads the "essential elements" and "overall process" language in *Northeast Marine Terminal* and *Pfeiffer* in far too cramped a manner (Pet. App. 13A-16A), giving no effect to the directive in those cases that the Act's coverage be viewed expansively, and making no accommodation for the impact of modern technology on cargo handling techniques, for the high degree of job specialization, or for the extent of unionization within the longshore industry.[17] In addition, the conflict between the state court's decision and the weight of federal authority in and of itself offends Congress's goal of applying a "simple, uniform standard of coverage" to LHWCA claims.[18]

---

[15] See, *e.g.*, *Harmon* v. *Baltimore & O.R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984) (railroad worker injured while repairing coal loading equipment is covered employee because his "functions were an integral part of the process of unloading and loading vessels and were vital to the movement of maritime cargo"); *Prolerized New England Co.* v. *Miller*, 691 F.2d 45, 47 (1st Cir. 1982) (worker performing maintenance of ship loading equipment plays "integral part" in loading process); *Sea-Land Services, Inc.* v. *Director, Office of Workers' Compensation Programs*, 685 F.2d 1121, 1123 (9th Cir. 1982) (LHWCA applies to mechanic responsible for repairing equipment used to load cargo onto ships and move it within terminal area because "repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' "); *Hullinghorst Indus., Inc.* v. *Carroll*, 650 F.2d 750, 755-756 (5th Cir. 1981) (carpenter building scaffolding for repairs to loading pier engaged in "maritime employment," since "the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of 'maritime employment' " under the Act and such work is "an integral part * * * an essential and indispensable step in the [pier] repairs to be effected"), cert. denied, 454 U.S. 1163 (1982); *Garvey Grain Co.* v. *Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 370 (7th Cir. 1981) (millwright responsible for maintenance and repair of shiploading equipment is employee under LHWCA, since these "functions are an integral part of the loading and unloading" process and "are directly connected with and are vital to the movement of maritime cargo"); *Prolerized New England Co.* v. *Benefits Review Bd.*, 637 F.2d 30, 37 (1st Cir. 1980) (coverage extends to employee whose duties include shortening scrap steel for shipment because "[v]iewed in terms of this functional analysis * * * [the claimant's] repair, maintenance and occasional operation of the varied elements of Prolerized's integrated loading system qualify as peculiarly maritime services"), cert. denied, 452 U.S. 938 (1981); *Price* v. *Norfolk & W. Ry.*, 618 F.2d 1059, 1061 (4th Cir. 1980) (railroad worker injured while painting "gallery" used for loading grain into ships falls within LHWCA's ambit because "[t]he gallery, and its maintenance, are essential to the loading and unloading of all vessels").

[16] The Virginia Supreme Court's continued reliance on *Weyerhaeuser Co.* v. *Gilmore* is misplaced. The Ninth Circuit has made it clear that it reads *Weyerhaeuser's* "realistically significant relationship" language to mean that "repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' covered by the Act." *Sea-Land Services, Inc.*, 685 F.2d at 1123. Thus, the Ninth Circuit applies its *Weyerhaeuser* formulation in harmony with authority in the other federal circuits.

3. A restrictive interpretation of landward coverage under the LHWCA conflicts with the Department of Labor's interpretation of the Section 2(3) status requirement, which it has consistently applied since 1972 in administering the LHWCA workers' compensation program. See *Northeast Marine Terminal,* 432 U.S. at 272 (Director's view that " 'maritime employment * * * include[s] all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation' "). Review is warranted because, at the very least, the Department's interpretation is "based on a permissible construction of the statute"; hence it is entitled to deference and should be given effect. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); see, *e.g.*, *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs,* 461 U.S. 624, 635 (1983) (consistent practice of those charged with enforcement and interpretation of LHWCA entitled to deference); *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978) (great deference due interpretation of officers or agency administering statute); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969) (construction of statute by those charged with executing it should be followed "unless there are compelling indications that it is wrong").

Further, a restrictive interpretation is also inconsistent with the view of the Benefits Review Board. See, *e.g.*, *Wuellet* v. *Scappoose Sand & Gravel Co.*, 18 Ben. Rev. Bd. Serv. (MB) 108, 110-111 (1986) (welder/mechanic injured while repairing conveyor belt at barge-loading facility is covered under LHWCA since "the repair of equipment at employer's barge facility is an integral part of the loading process * * * and therefore is a maritime activity"); *Verderane* v. *Jacksonville Shipyards, Inc.*, 20 Ben. Rev. Bd. Serv. (MB) 62, 64 (1984) (manager of shipyard's Medical, Safety and Security Department, whose duties required inspecting certain shipbuilding equipment and assuring compliance with safety regulations, was covered employee since he "performed an integral role in assuring" shipyard workers' safety and his duties "were important to the overall progress of maritime construction").

---

[17] Thus, for example, but for the union contracts that prohibited them from placing the trash coal that they had cleared away back on the conveyor belts, Schwalb and McGlone indubitably would have done so. They would then have been involved directly in the actual loading process.

[18] Goode also makes an unpersuasive argument that the state court's exclusion of him from LHWCA coverage is not at odds with the overwhelming weight of federal case law because, until the "unloading process had been completed, the coal was still in land transportation and was not in the process of being loaded aboard a ship" (88-127 Br. in Opp. 20-21). The circuit court specifically found that "the process of loading the coal into vessels begins" once the rail cars leave the barney yard (Pet. App. 46A), and Goode has not even suggested that this finding should be set aside. Additionally, although the decision of the Fourth Circuit in *Conti* v. *Norfolk & W. Ry.*, 566 F.2d 890 (1977) (brakemen injured at Lambert's Point were not employees under the LHWCA) supports Goode's argument, we agree with the observation of the Court of Appeals for the District of Columbia Circuit that the Fourth Circuit has "moved away from using the distinction between 'traditional railroading tasks' and 'traditional maritime tasks' as the sole inquiry, or the dispositive issue in LHWCA cases." *Harmon* v. *Baltimore & O.R.R.*, 741 F.2d 1398, 1404 (1984) (citing *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1050 (4th Cir. 1980) (*Conti* cited only for "integral part" language); *Price, supra* (drawing no *Conti*-like distinction between "traditional railroading" as opposed to "traditional maritime" tasks), and *Vogelsang* v. *Western Maryland Ry.*, 670 F.2d 1347, 1348 (4th Cir. 1982) (distinguishing *Conti*)). This and other courts have, of course, found railroad workers covered by the LHWCA despite the parallel coverage of the FELA, see, *e.g.*, *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334 (1953); *Harmon, supra*; *Vogelsang, supra*; *Price, supra*, and in such circumstances LHWCA coverage is exclusive under 33 U.S.C. 905.

4. The Virginia Supreme Court's interpretation of the LHWCA's status requirement creates a wide rift between the state court, on the one hand, and the federal courts, the Department of Labor, and the BRB, on the other. While normally a single aberrational decision would not warrant this Court's review, we agree with petitioners that the potential impact of the conflict here is substantial, especially in view of the vagaries of Virginia's venue statute (see 87-1979 Pet. 38-39; 88-127 Pet. 42-43). The decision invites forum-shopping among injured workers, including many who reside out-of-state. Workers with potentially strong FELA claims will opt for state court actions, while those confronted with the choice between inadequate or uncertain state remedies and LHWCA benefits will sue in federal court. This result plainly frustrates Congress's intent that a single uniform standard of coverage apply to LHWCA claims. Accordingly, review by this Court is warranted to resolve this conflict.

CONCLUSION

The petitions for writs of certiorari should be granted and the cases consolidated for oral argument.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTINE DESAN HUSSON
Assistant to the Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

CHRISTINE L. OWENS
Attorney
Department of Labor

JANUARY 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699 00050

AMICUS CURIAE

BRIEF

MOTION FILED
JUL 5 1988

10

No. 87-1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITION

STEPHEN A. TRIMBLE*
PATRICK KAVANAUGH
KEVIN J. O'CONNELL
HAMILTON AND HAMILTON
734 15th Street, N.W.
11th Floor
Washington, D.C. 20005
(202) 347-2882

Attorneys for Amici Curiae

**Counsel of Record*

July 5, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the State court below properly allowed cases to proceed under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, based upon its view that the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* does not provide coverage for an injury sustained by an employee in the course of his employment where his duties involve maintenance necessary for the continuing operation of mechanized equipment utilized in loading ocean-going vessels, this view being in direct conflict with the decisions of the various federal circuits (including the Fourth Circuit, in which that State is located) which have considered the question.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE ... 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

- I. The Uniform Construction of Federal Statutes Should Not Be Undermined By A State Court 3
- II. The Decision Below Is In Direct Conflict With The Federal Decisions Under Both Acts 6
- III. The Uncertainty Created By The Decision Below Results In Significant Practical Problems 8

CONCLUSION 11

TABLE OF AUTHORITIES

CASES: Page

Avondale Shipyards, Inc. v. Vinson, 623 F.2d 1117 (5th Cir. 1980) 9

Bennett v. Matson Terminals, 14 BRBS 526, BRB No. 80-354 (1981) 7

Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962) 4

Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U.S. 44 (1931) 5

Director, etc. v. Perini North River Associates, 459 U.S. 297 (1983) 4

Felder v. Casey, 486 U.S. ___, 56 U.S.L.W. 4689 (decided June 22, 1988) 5

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 5

Garvey Grain Co. v. Director, Office of Workers' Compensation Programs, 639 F.2d 366 (7th Cir. 1981) 7

Graziano v. General Dynamics Corp., 663 F.2d 340 (1st Cir. 1981) 7

Harmon v. Baltimore & O. R. Co., 741 F.2d 1398 (D.C. Cir. 1984) 7

Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985) 4, 6

Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) 7

Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. ___, 56 U.S.L.W. 4494 (decided June 6, 1988) 5

Nogueira v. New York, N.H. & H.Ry. Co., 281 U.S. 128 (1930) 4

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980) 4

Page

Northeast Marine Terminal Co., v. Caputo, 432 U.S. 249 (1977) 4, 7

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979) 4

Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1953) 4

Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980) 7, 8

St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985) 5

Weyerhaeuser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1976), *cert. denied*, 429 U.S. 868 (1976) . 6, 7

Wuellet v. Scappoose Sand and Gravel Co., 18 BRBS 108, BRB No. 83-404 (1986) 7

STATUTES:

United States Code:

Longshore and Harbor Workers' Compensation Act:

- 33 U.S.C. § 901, *et seq.* .... *passim*
- 33 U.S.C. § 907 10
- 33 U.S.C. § 908 .... 10, 11
- 33 U.S.C. § 912 8
- 33 U.S.C. § 914 9
- 33 U.S.C. § 915 10
- 33 U.S.C. § 923 9
- 33 U.S.C. § 930 8

Page

Federal Employers' Liability Act:

- 45 U.S.C. § 51, *et seq.* .... *passim*
- 45 U.S.C. § 51 9
- 45 U.S.C. § 53 9
- 45 U.S.C. § 55 11
- 45 U.S.C. § 56 .... 4, 5

Railroad Unemployment Insurance Act:

- 45 U.S.C. § 351, *et seq.* 9
- 45 U.S.C. § 362 9

REGULATIONS:

Code of Federal Regulations:

- 20 C.F.R. § 702 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1979

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITION

This brief of the Association of American Railroads and the National Association of Railroad Trial Counsel is filed with the consent of the parties, the letters expressing such consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICI CURIAE

The Association of American Railroads is a voluntary, unincorporated, non-profit trade organization, headquartered in Washington, D.C. Its members constitute the vast majority of the Nation's railroads. They operate approximately 85% of the line-haul mileage, produce approximately 93% of the freight revenues and employ approximately 90% of the railway work force in the United States, having in the aggregate nearly 300,000 employees who, if injured, are subject to the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (hereinafter "FELA"), unless their injuries are compensable under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter "LHWCA"). The interest of the Association is to maintain nationwide uniformity in the determination as to which Act applies to those railroad employees injured while performing duties in connection with the loading and unloading of vessels.

The National Association of Railroad Trial Counsel is a voluntary, unincorporated non-profit organization, headquartered in Los Angeles, California. Its membership consists of more than 1,200 trial lawyers, who represent all of the significant railroads operating throughout the United States. One of its principal objectives is to furnish railroad counsel with a forum for the study of legal problems associated with railroad personal injury cases, including those filed by employees under the FELA and the LHWCA, with particular interest in the substantive law and the strategy and tactics to be utilized therein, as well as to enable its members to advise their railroad clients as to the proper handling of such injury cases depending upon which of the Acts is involved.

SUMMARY OF ARGUMENT

The decision below of the Supreme Court of Virginia involves the line of demarcation between two federal statutes, the FELA and the LHWCA, as applied to two railroad employees injured while performing their duties in connection with the loading

of vessels. While acknowledging that the LHWCA's "exclusivity" provision requires such a claim to be filed under the LHWCA and not the FELA, the State court below allowed the FELA action to proceed by applying an unduly narrow construction of the LHWCA's coverage provision requiring "maritime employment",[1] so as to conflict with the decisions of every federal court of appeals which has considered the question. Significantly, the decision below expressly recognized that it was in direct conflict with a decision of the Fourth Circuit (which includes the State of Virginia), so as to produce the repugnant anomaly of different results when the employee files suit under the FELA, depending upon whether suit is filed in federal or state court. The obvious need for uniformity in decisions involving the inter-relationship of these federal statutes presents the special and important reason for the Court to grant the Petition herein.

ARGUMENT

I. The Uniform Construction Of Federal Statutes Should Not Be Undermined By A State Court

For the railroad worker who is injured while performing duties in connection with the loading and unloading of ships, such as the respondents herein, the express terms of both the FELA and the LHWCA apply. However, it has been settled for over 50 years that a railroad worker may not sue under the FELA if his injury is within the coverage of the LHWCA, due to the "exclusivity" provisions of the latter statute. *See, Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953); *Nogueira v. New York, N.H. & H.Ry. Co.*, 281 U.S. 128 (1930).

---

[1] The "situs-status" test for "maritime employment", as developed through this Court's previous decisions under the 1972 Amendments to the LHWCA, is adequately discussed in the Petition. Accordingly, it will not be addressed herein.

The importance of uniformity in the decisions involving coverage of these two statutes has been long recognized by this Court. As to the LHWCA, the Court has granted certiorari "because of the importance of the interpretation of [the provisions governing coverage] in the administration of the Act." *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 116 (1962). This has been particularly true since the 1972 Amendments thereto which extended the Act's coverage landward, occasioned in part by the modern technology involved, as here, in shiploading. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985); *Director, etc. v. Perini North River Associates*, 459 U.S. 297 (1983); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). Indeed, in discussing the 1972 Amendments in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 83 (1979), this Court observed that "Congress intended to apply a simple, uniform standard of coverage."

Similarly with respect to the FELA, this Court has been mindful of the necessity for uniform interpretation:

> One of the purposes of the Federal Employers' Liability Act was to "create uniformity throughout the Union" with respect to railroads' financial responsibility for injuries to their employees.

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 493 n.5 (1980). Section Six of the FELA (45 U.S.C. § 56) provides for concurrent jurisdiction of suits in the federal and state courts, and, to insure uniformity in the decisions under this federal law, this Court has found it necessary on several occasions to remind the various state courts that they are required to follow the pronouncements of the federal courts in FELA cases. *See, e.g., Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. ___, 56 U.S.L.W. 4494 (decided June 6, 1988); *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985); *Chesapeake & Ohio Ry. Co. v. Kuhn*, 284 U.S. 44, 46-47 (1931).

Indeed, when a state court is vested with concurrent jurisdiction under a federal statute, it is bound to proceed with the matter in accordance with the controlling federal substantive law. *See, Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942). The interplay between state and federal courts in construing the other's laws, and the impermissibility of a different outcome depending on whether a federal claim is filed in federal or state court, was only recently discussed in *Felder v. Casey*, 486 U.S. ___, 56 U.S.L.W. 4689, 4695 (decided June 22, 1988):

> * * * Just as federal courts are constitutionally obligated to apply state law to state claims [under the *Erie* doctrine], so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." [Citation omitted].

Whether viewed from the standpoint of the LHWCA or that of the FELA, the decision of the state Court below is totally out of step with the uniform federal law on the subject. Moreover, since the

Commonwealth of Virginia is an important situs in determining the line of demarcation to be utilized in the administration of these federal laws,[2] the decision below should be reviewed by this Court.

II. The Decision Below Is In Direct Conflict With The Federal Decisions Under Both Acts

The Court below acknowledged that both respondents were required to clear coal spilled in the loading process under the loading facility's conveyor belts and in its "trunnion rollers" because the spilled coal can cause either ". . . the dumpers to malfunction . . ." or, if allowed to accumulate beneath the belts, ". . . may damage the belts and interrupt the loading process" (Slip op. at p.2). It nevertheless held the LHWCA inapplicable because the employees were not physically engaged in the handling of cargo.[3] This

---

[2] The Norfolk area contains two of the Nation's largest railroad coal shiploading facilities: those involved herein, and those operated by the Norfolk & Western Railway at Lamberts Point. In addition, as correctly pointed out in the Petition, Virginia law permits the bringing of FELA cases in the Virginia courts, irrespective of where the accident occurred, if a railroad does any business in Virginia. Thus, other railroads, such as CONRAIL, could be sued in the Virginia courts by its employees who are injured in connection with shiploading activities on Lake Erie.

[3] The decision below was premised in part upon a misreliance on this Court's decision in *Herb's Welding, Inc. v. Gray, supra*, as well as upon *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1976), *cert. denied*, 429 U.S. 868 (1976), neither of which is applicable. In *Herb's Welding*, the injured worker was a welder who worked on an oil platform. This Court found that the oil platform itself was to be treated as an "island" under the law and that claimant's activities had nothing to do with loading or unloading oil or any other product. In *Weyerhaeuser*, the injured

unduly restrictive view of the LHWCA, particularly in view of the 1972 Amendments to *extend* the coverage of the Act, conflicts with the various federal decisions which have considered the question, either based upon the LHWCA alone or those based upon the inter-relationship of the LHWCA with the FELA.

The federal courts, recognizing as this Court did in *Northeast Marine Terminal Co. v. Caputo, supra*, that the 1972 Amendments to the LHWCA were enacted to take into account technological advances in the shiploading process, hold that a worker whose job is to work on equipment which is an integral part of the shiploading process falls within the coverage of the LHWCA. *See, e.g., Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*, 639 F.2d 366 (7th Cir. 1981); *Graziano v. General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).[4]

Similarly, the decision below is in direct conflict with the federal cases which have considered the question in conjunction with the FELA. *E.g., Harmon v. Baltimore & O. R. Co.*, 741 F.2d 1398 (D.C. Cir. 1984); *Price v. Norfolk & Western Ry. Co.*, 618 F.2d

---

worker was held to be far removed from shiploading, since he worked in a log pond, shuffling and segregating logs prior to their being directed into the sawmill for fashioning into finished lumber, which later was to be loaded onto railroads and then transported for loading upon a ship.

[4] It should be noted that the Benefits Review Board, created by the Congress to adjudicate claims under the LHWCA, applies the same test. *See, e.g., Wuellet v. Scappoose Sand and Gravel Co.*, 18 BRBS 108, BRB No. 83-404 (1986); *Bennett v. Matson Terminals*, 14 BRBS 526, BRB No. 80-354 (1981).

1059 (4th Cir. 1980).[5] Both applied the approach taken by the other federal courts, holding that a railroad worker injured in connection with maintaining shiploading equipment was subject to the coverage of the LHWCA, and therefore could not maintain a suit under the FELA.

Thus, the decision below is not only in conflict with the federal decisions as to the extent of the LHWCA's coverage of workers injured in maintaining shiploading equipment generally, but also conflicts with those federal decisions which hold the FELA inapplicable when a railroad worker is injured under similar circumstances. Accordingly, the decision below should be reviewed by this Court.

III. The Uncertainty Created By The Decision Below Results In Significant Practical Problems

The decision of the Virginia Supreme Court, since it is in conflict with the federal circuits, including the very Circuit in which it is located—the Fourth Circuit, produces an uncertainty as to whether the claim of a railroad worker injured in connection with shiploading activities ultimately will be held subject to LHWCA or FELA coverage. This uncertainty, in turn, creates a number of practical problems for all concerned with the claim.

At the very outset, both the employee and the employer must make a decision as to whether to file the statutory notices required by the LHWCA (33 U.S.C. §§ 912 and 930), whereas no such notices are required under the FELA. Then the question arises as to the

scope of the investigation into the circumstances of the accident, since the LHWCA requires only that the employee be injured during the course and scope of his employment, whereas under FELA the investigation is necessarily more extensive since it involves questions of the railroad's negligence and the employee's contributory negligence because of the comparative negligence concept incorporated into the FELA (45 U.S.C. §§ 51 and 53). Even the ability of the parties to obtain doctors, for purposes of either examination or treatment, is affected because many physicians will not make their services available if there is a likelihood they will have to testify in court (under the FELA, in a jury trial). They tend to be more cooperative in LHWCA claims, where their written reports are sufficient, introduced under the relaxed rules of evidence prescribed by 33 U.S.C. § 923, or they may testify by deposition without having to physically be present at the hearing. *See, Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117 (5th Cir. 1980).

The railroad is then faced with the problem of whether to secure compensation benefits for the injured employee as required under the LHWCA, which imposes penalties for failure to do so (33 U.S.C. § 914). By contrast, under the FELA, interim disability or unemployment benefits are obtained by the employee from the Railroad Retirement Board (45 U.S.C. § 351, *et seq.*) and not from the railroad. If the employee recovers under the FELA, there is a statutory lien on his recovery for the amounts paid by the Board. 45 U.S.C. § 362(o).

There are many other practical difficulties which emanate from the uncertainty created by the decision below. Without listing them in detail,[6] these difficulties pale by comparison with the major difficulty—the practical inability to conclude a settlement of the claim due to the totally different schemes of compensation contemplated by LHWCA and the FELA. Under LHWCA, compensation is awarded generally on the basis of a percentage of average weekly wages, either under a schedule for enumerated injuries or to compensate the employee for diminished wage-earning capacity (33 U.S.C. § 908). On the other hand, under FELA damages are awarded to the employee by a jury on the same basis generally allowed in other civil cases.[7] Because the benefits available under the respective statutes are different, resolution of claims by settlement would be virtually impossible until the final adjudication of the question as to which of the statutes applies,[8] necessitating that the case be filed in the courts for a final resolution.

---

[5] The decision below acknowledged its direct conflict with *Price*, (Slip op. at pp. 5-6).

---

[6] These include items which appear to have limited legal significance, but which have great consequence for the injured employee. For example, under LHWCA, the employee must continue treatment by his original physician unless the employer consents to a change (20 C.F.R. § 702.406), whereas under FELA he may go to any physician of his choice.

[7] Under FELA, there is only one recovery for past, present and future injuries and losses, including medical expenses. Under LHWCA, the employer is liable in cases of temporary or permanent injury to pay the prescribed amounts throughout the period of disability and is under a continuing duty to provide medical attention therefor. 33 U.S.C. § 907.

[8] Even assuming *arguendo* that the parties were able to agree upon a settlement, that would not necessarily put the problem to rest because of the "Catch-22" situation created by the two statutes. The LHWCA renders invalid any agreement waiving compensation under the Act (33 U.S.C. § 915[b]), and an em-

Thus, the uncertainty created by the decision below not only generates many difficulties for the employee, the railroad, and their respective attorneys, but also serves to burden the courts with yet additional litigation.

CONCLUSION

On the basis of the foregoing, *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel respectfully submit that the petition for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case should be granted.

Respectfully submitted,

Stephen A. Trimble*
Patrick Kavanaugh
Kevin J. O'Connell
Hamilton and Hamilton
734 15th Street, N.W.
11th Floor
Washington, D.C. 20005
(202) 347-2882

Attorneys for Amici Curiae

*Counsel of Record

July 5, 1988

---

ployer's liability is not discharged unless the settlement is approved by the Commission (33 U.S.C. § 908[i][1]). The FELA similarly precludes any contract or device by which the carrier exempts itself from liability under that Act. (45 U.S.C. § 55).

JOINT APPENDIX

(*) Nos. 87-1979 and 88-127 (*)

Supreme Court, U.S.
FILED
APR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

Chesapeake and Ohio Railway Company,
Petitioner,
v.
Nancy J. Schwalb and William McGlone,
Respondents.

Norfolk and Western Railway Company,
Petitioner,
v.
Robert T. Goode, Jr.,
Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

CONSOLIDATED JOINT APPENDIX

William T. Prince*
Edward L. Oast, Jr.**
John Y. Richardson, Jr.
Joan F. Martin
Williams, Worrell,
Kelly, Greer & Frank
600 Crestar Bank Building
Norfolk, Virginia 23510
804-624-2600
Attorneys for Petitioners

*Counsel of Record
In No. 87-1979
**Counsel of Record
In No. 88-127

C. Gerard Thompson
Moody, Strople and
Kloeppel, Ltd.
Commerce Bank Building
500 Crawford Street
Portsmouth, Virginia 23705
804-393-4094
Attorneys for Respondents Schwalb and McGlone

Richard J. Tavss
Counsel of Record
Bruce A. Wilcox
Tavss, Fletcher &
Early, P.C.
Suite 100, Royster Building
Norfolk, Virginia 23514
804-625-1214
Attorneys for Respondent Goode

PETITION FOR CERTIORARI, NO. 87-1979, FILED JUNE 2, 1988
PETITION FOR CERTIORARI, NO. 88-127, FILED JULY 21, 1988
CERTIORARI GRANTED FEBRUARY 21, 1989

200pp

CONSOLIDATED JOINT APPENDIX TABLE OF CONTENTS

Page

Relevant Docket Entries, *Chesapeake and Ohio v. Nancy J. Schwalb* [*Schwalb*] JA-1

Relevant Docket Entries, *Chesapeake and Ohio v. William McGlone* [*McGlone*] JA-2

Relevant Docket Entries, *Norfolk and Western v. Robert T. Goode, Jr.* [*Goode*] JA-3

Motion for Judgment, *Schwalb* JA-4

Defendant's Special Plea to Jurisdiction, *Schwalb* . JA-8

Motion for Judgment, *McGlone* JA-9

Defendant's Special Plea to Jurisdiction, *McGlone* JA-12

Motion for Judgment, *Goode* JA-13

Motion to Dismiss and Grounds of Defense, *Goode* JA-17

Opinion of Supreme Court of Virginia, *Schwalb and McGlone v. Chesapeake & Ohio Railway Co.* .. JA-20

Opinion, Circuit Court of the City of Newport News, Virginia, *Schwalb* JA-28

Opinion, Circuit Court of Portsmouth, Virginia, *McGlone* JA-30

Opinion, Circuit Court of the City of Norfolk, Virginia, *Goode* JA-34

Order, Circuit Court of the City of Newport News, Virginia, *Schwalb* JA-40

Order, Circuit Court of the City of Portsmouth, Virginia, *McGlone* JA-41

Order, Circuit Court of the City of Norfolk, Virginia, *Goode* JA-43

Order, Supreme Court of Virginia, *Schwalb* JA-44

Order, Supreme Court of Virginia, *McGlone* JA-45

Order, Supreme Court of Virginia, *Goode* JA-46
33 U.S.C.A. § 902(3) (West 1986) JA-47
33 U.S.C. § 902(3) as amended in 1972 but prior to 1984 Amendment JA-48
33 U.S.C.A. § 905 (West 1986) JA-48
45 U.S.C.A. § 51 (West 1986) JA-49
Partial Transcript of *Schwalb* Evidentiary Hearing JA-50
Exhibit (photograph) introduced in *Schwalb* Evidentiary Hearing JA-78
Partial Transcript of *McGlone* Evidentiary Hearing JA-79
Plaintiff's Request for Production of Documents, *McGlone* JA-108
Defendant's Response to Request for Production of Documents, *McGlone*, with attachments JA-110
Partial Transcript of *Goode* Evidentiary Hearing . JA-127
Exhibits (Exhibit Description , Plat and 4 photographs) introduced in *Goode* Evidentiary Hearing JA-169
Exhibit (Excerpts from Deposition of Robert T. Goode, Jr.) introduced in *Goode* Evidienting Hearing JA-175
Affidavit of Ronel Lee Croft, *Goode* JA-190
Affidavit of Raymond D. Wethington, *Goode* JA-194

RELEVANT DOCKET ENTRIES

CHESAPEAKE AND OHIO RAILWAY COMPANY V. NANCY J. SCHWALB

DATE	PROCEEDINGS
11/04/83	Motion for Judgment (by pltf) . . . action arises under FELA
11/30/83	Answer and Grounds of Defense (by deft)
01/13/84	Special Plea to Jurisdiction (by deft) . . . sole remedy under LHWCA
06/06/84	Evidentiary HEARING on jurisd. question before Judge Douglas M. Smith
08/08/84	Opinion Letter (DMS) . . . sustaining plea, pltf's remedy under LHWCA
	ORDER (trial court) . . . action dismissed with prejudice . . . eod 8/22/84
09/12/84	Notice of Appeal (by pltf)
03/04/88	OPINION, Virginia Supreme Court (Justice Richard H. Poff) . . . pltf not LHWCA employee
	ORDER (Virginia Supreme Court) . . . judgment reversed and annulled, case remanded for trial under FELA . . . eod 3/4/88
	ORDER (Virginia Supreme Court) . . . execution of judgment suspended pending resolution of pet. for writ of certiorari . . . eod 6/8/88

RELEVANT DOCKET ENTRIES

CHESAPEAKE AND OHIO RAILWAY COMPANY V. WILLIAM MCGLONE

DATE	PROCEEDINGS
05/31/83	Motion for Judgment (by pltf) . . . action arises under FELA
06/24/83	Special Plea to Jurisdiction (by deft) . . . sole remedy under LHWCA
03/29/85	Evidentiary HEARING on jurisdictional question before Judge Lester Schlitz
05/29/85	Opinion Letter (LS) . . . sustaining plea, pltf's sole remedy under LHWCA
	ORDER (trial court) . . . action dismissed with prejudice . . . eod 6/13/85
07/02/85	Notice of Appeal (by pltf)
03/04/88	OPINION, Virginia Supreme Court (Justice Richard H. Poff) . . . pltf not LHWCA employee
	ORDER (Virginia Supreme Court) . . . judgment reversed and annulled, case remanded for trial on merits under FELA . . . eod 3/4/88
	ORDER (Virginia Supreme Court) . . . execution of judgment suspended pending resolution of pet. for writ of certiorari . . . eod 6/8/88

RELEVANT DOCKET ENTRIES

NORFOLK & WESTERN RAILWAY CO. V. ROBERT T. GOODE, JR.

DATE	PROCEEDINGS
2/13/86	Motion for Judgment (by pltf) . . . action arises under FELA
3/13/86	Motion to Dismiss and Grounds of Defense (by deft) . . . exclusive jurisdiction under LHWCA
9/19/86	Evidentiary HEARING on jurisd. question before Judge Charles R. Waters, II
11/13/86	Opinion Letter (CRW) . . . dismissing motion for judg., exclusive jurisd. under LHWCA
	ORDER (trial court) . . . action dismissed with prejudice . . . eod 12/17/86
1/7/87	Notice of Appeal (by pltf)
	ORDER (Virginia Supreme Court) . . . judgment reversed and case remanded for trial on merits under FELA . . . eod 4/22/88
	ORDER, Virginia Supreme Court, issuance of mandate deferred

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

LAW NO. 8827-S

NANCY J. SCHWALB,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A CORPORATION,

Defendant.

MOTION FOR JUDGMENT

Plaintiff moves the Court for judgment and award of execution against the Defendant, in the sum of $1,000,000.00, on the following grounds:

1. This action arises under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq., as hereinafter more fully appears.

2. During all times mentioned herein, Defendant owned and operated, in interstate commerce, a railroad, and the operations and work of the Plaintiff, as hereinafter alleged, were a part and parcel of the operation of the Defendant's line in interstate commerce at the time of injuries to the Plaintiff.

3. Plaintiff is a resident of Newport News, Virginia, and at all times herein mentioned, was employed by the Defendant as a laborer, and worked at said job in the City of Newport News, on the Defendant's premises, which premises were owned, operated and controlled by Defendant.

4. Jurisdiction and venue lie with this Court by virtue of the foregoing.

5. That on January 12, 1983 at about 12:15 a.m. of said day, the Plaintiff was engaged in the customary performance of her duties, and was required by Defendant to be working in its yards in Newport News, Virginia, under the supervision of other employees of the Defendant. Plaintiff was required to clean the trunion rollers which required her to walk on the catwalk, which was not lighted. As Plaintiff was walking on the catwalk to the rollers, she missed a step which she could not see causing her to fall forward, striking her head on the metal catwalk, and became unconscious, and injuring her thumb on the railing. Plaintiff was required to work in a dark and dangerous place which was not lighted. Defendant failed to provide a flashlight or other adequate lighting. Defendant failed to provide adequate help and assistance and failed to provide any safety devices. Plaintiff was then and there and at all times herein mentioned, acting in the exercise of reasonable care for her own safety.

6. At all pertinent times it became and was the duty of Defendant to:

(a) Furnish Plaintiff a reasonably safe place to work.

(b) Exercise reasonable care and caution for the safety of Plaintiff while she was performing said work.

7. While Plaintiff was engaged in the performance of the aforesaid work required by Defendant, she was caused to sustain injuries as hereinafter set forth by reason of the violation of the Defendant of its aforesaid duties.

8. At said time and place, the Defendant and its employees as aforesaid, in violation of the Federal Employers' Liability Act of the United States, carelessly and negligently did one or more of the following acts or omissions which were the cause of said occurrence, and the injuries sustained by the Plaintiff.

(a) Failed to furnish Plaintiff a reasonably safe place within which to do her said work;

(b) Failed to provide plaintiff with safe and proper tools and equipment to do said work;

(c) Failed to provide a flashlight and/or adequate lighting to safely do said work;

(d) Failed to provide adequate help and assistance;

(e) Failed to inspect, repair and maintain its premises;

(f) Failed to adopt, enforce, and carry out safe customs and practices in doing said work;

(g) Negligently assigned Plaintiff to walk on a dangerous catwalk without providing adequate safety precautions and equipment; without providing a flashlight; without providing adequate lighting; without providing adequate help and assistance; negligently assigning plaintiff to walk on a catwalk which was not lighted, all of which Defendant knew or should have known in the exercise of due care was dangerous and unsafe for Plaintiff.

(h) Other acts of negligence which may be shown at trial.

9. As a direct and proximate result of the aforementioned negligence and carelessness of the Defendant and its employees and its Violation of the Federal Employers' Liability Act as aforesaid, Plaintiff has suffered severe injuries to her head and thumb, has suffered severe brain damage, and was otherwise injured; has suffered pain in the past and will suffer pain in the future; has incurred expenses for medical attention and hospitalization and will incur further like expenses in the future, has suffered loss of earnings in the past and will suffer same in the future; has suffered permanent injury and disability, all to her injury and damage.

10. That by reason of the foregoing, Plaintiff has sustained damages at the hands of the Defendant in the sum of$1,000,000.00.

WHEREFORE, Plaintiff demands judgment against the above named defendant, The Chesapeake and Ohio Railway Company, a Corporation, in the sum of $1,000,000.00, together with the costs of the action incurred herein.

NANCY J. SCHWALB

By /s/ Peter W. Rowe
Of Counsel

By /s/ Donald L. Rudquist
Of Counsel

Peter W. Rowe, Esq.
STACKHOUSE, ROWE & SMITH
1400 Virginia National
Bank Building
P. 0. Box 3570
Norfolk, Virginia 23514
Tel: (804) 623-3555
and
Donald L. Rudquist, Esq.
DePARCQ, PERL, HUNEGS,
RUDQUIST & KOENIG, P.A.
608 Building, Room 565
608 Second Avenue South
Minneapolis, Minnesota 55402
Tel: (612) 339-4511

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

LAW NO. 8827-S

NANCY J. SCHWALB,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A CORPORATION,

Defendant.

SPECIAL PLEA TO JURISDICTION

Now comes the defendant whose proper name is The Chesapeake and Ohio Railway Company and appearing specifically in response to the plaintiff's Motion for Judgment says that this court lacks jurisdiction herein on the ground that the plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 905(a).

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY

By /s/ Richard Wright West
Of Counsel

Richard Wright West, Esquire
WEST, STEIN, WEST & SMITH, P.C.
P. 0. Box 257
Newport News, VA 23607
Counsel for Defendant

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

AT LAW NO. ______

WILLIAM C. MCGLONE,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

SERVE:

Aubrey R. Bowles, III, Esquire
Registered Agent,
Chesapeake & Ohio Railway Company
901 Mutual Building
Richmond, Virginia 23219

MOTION FOR JUDGMENT

The plaintiff hereby moves this Honorable Court for a Judgment and an award of execution against the defendant, the Chesapeake and Ohio Railway Company, in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00) by reason of the following facts, to-wit:

1. That the defendant is a Railroad Corporation organized and existing under and by virtue of the laws of the State of VIRGINIA, and was, at all times mentioned herein doing business within the jurisdiction of this Court as a common carrier of intrastate and interstate commerce.

2. The plaintiff's action arises under the following Act of Congress of April 22, 1908, 35 Stat. 65, Chap. 149, with amendments thereto, more commonly known as "The

Federal Employers' Liability Act" (45 USCA Chap. 2, Sec. 51-60), as amended on August 11, 1939.

3. That at all times herein mentioned defendant was an intrastate and interstate carrier and was engaged in interstate transportation and commerce. At the time of his injury, plaintiff was working in furtherance of interstate commerce and participating in work which directly, closely and substantially affected the general interstate commerce carried on by the defendant.

4. That on or about February 1, 1983 the plaintiff was an employee of the defendant, Chesapeake and Ohio Railway Company, as a laborer, and on or about said date, while so employed in the regular course of his duties on land at Newport News, Virginia, was injured while performing such duties, to-wit: While trying to blow coal out from beneath Number Three (3) Belt a roller caught the air hose and jerked the hose and plaintiff's right arm into the roller causing him serious injury.

5. The defendant herein regularly and systematically conducts affairs or business activity within the City of Portsmouth, Virginia.

6. That the defendant negligently and carelessly failed to provide plaintiff with a safe place to work, and required plaintiff to work on premises that were maintained in a negligent manner; that defendant negligently and carelessly failed to provide plaintiff with adequate, effective, and efficient assistance, equipment and instructions or time to carry out his duties, and failed to maintain and provide plaintiff efficient and safe equipment; that defendant's agents, servants and employees acted in a negligent and careless manner; that defendant failed to properly inspect its equipment and premises and that as a result of the aforesaid carelessness and negligence of the defendant the plaintiff was caused to suffer severe and permanent injuries.

7. That the defendant Railway Company failed to comply with the Federal Employers' Liability Act (45 USCA Chap. 2, Secs. 51-60) as amended on August 11, 1939, as hereinbefore more fully appears.

8. That as a result of the accident of February 1, 1983 the plaintiff was caused to lose, and he will in the future be caused to lose, income which he otherwise would have earned.

9. That as a result of the accident of February 1, 1983, the plaintiff was caused to suffer, and will in the future be caused to suffer, great physical pain and mental anguish.

10. That as a result of the accident of February 1, 1983, the plaintiff was caused to expend, and he will in the future be caused to expend, large sums of money for medical expenses.

11. That as a result of the accident of February 1, 1983, the plaintiff was caused to be unable, and he will in the future be unable, to perform his necessary and lawful affairs.

WHEREFORE, plaintiff demands a trial by jury and prays for judgment against the defendant, The Chesapeake and Ohio Railway Company, in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00) with interest and his costs.

WILLIAM C. MCGLONE

By /s/ Russell N. Brahm, III
Of Counsel

Russell N. Brahm, III
Willard J. Moody
Moody, Strople, Brahm
& Lawrence, Ltd.
P. 0. Box 1138
Portsmouth, Virginia 23704-1138

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

LAW NO. L-83-327

WILLIAM C. MCGLONE,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

SPECIAL PLEA TO JURISDICTION

Now comes the defendant appearing specially in response to the plaintiff's Motion For Judgment and says that this court lacks jurisdiction herein on the ground that the plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 905(a).

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY

By /s/ Richard Wright West
Of Counsel

Richard Wright West, Esquire
WEST, STEIN, WEST & SMITH, P.C.
P. 0. Box 257
Newport News, VA 23607
Counsel for Defendant

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY CO.,

Defendant.

Serve: Richard A. Keeney
Registered Agent
8 North Jefferson Street
Roanoke, Virginia 24042

MOTION FOR JUDGMENT

The Plaintiff hereby moves this court for a judgment and an award of execution against the Defendant, Norfolk and Western Railway Company, in the sum of One Million Two Hundred Fifty Thousand Dollars, ($1,250,000.00) by reason of the following facts, to-wit:

1. That the Defendant is a railroad corporation organized and existing under and by virtue of the laws of the State of Virginia, and was, at all times mentioned herein doing business within the jurisdiction of this Court as a common carrier of intrastate and interstate commerce.

2. That Plaintiff's action arises under the Acts of Congress of April 22, 1908, 35 Stat. 65, Chapter 149, with amendments thereto, commonly known as The Federal Employers' Liability Act (45 USCA Chap. 2, Sec. 51-60),

as amended August 11, 1939, as hereinafter more fully appears.

3. That at all times herein mentioned Defendant was an intrastate and interstate carrier, and was engaged in interstate transportation and commerce. At the time of his injury, Plaintiff was working in furtherance of interstate commerce and participating in work which directly, closely and substantially affected the general interstate commerce carried on by the Defendant.

4. That on or about February 11, 1985, Plaintiff was an employee of the Defendant and on or about said date, while so employed, in the regular course of his duties at or near the Barney Yard, Lamberts Point Yard, Norfolk, Virginia, Plaintiff was injured while performing such duties.

5. That the Defendant negligently and carelessly failed to provide Plaintiff with a safe place to work; required Plaintiff to report and work on premises that were maintained in a negligent manner; that Defendant negligently and carelessly failed to maintain and provide the Plaintiff sufficient and safe equipment; that Defendant negligently and carelessly failed to inspect, repair and maintain the area of the accident and failed to warn Plaintiff of a dangerous condition that existed in the work area; that the Defendant failed to provide sufficient and adequate assistance for Plaintiff to safely perform his work duties; that the Defendant negligently and carelessly allowed a dangerous condition to exist; that Defendant failed to use modern, safe and efficient equipment in the machinery on which Plaintiff was required to work; and that as a result of the aforesaid carelessness and negligence of the Defendant, the Plaintiff was caused to suffer severe and permanent injuries.

6. That the Defendant failed to comply with The Federal Employers' Liability Act (45 USCA Chap. 2, Secs. 51-60) as amended on August 11, 1939, as hereinbefore more fully appears.

7. That as a result of the accident complained of herein, the Plaintiff was caused to lose, and will in the future be caused to lose, income which he otherwise would have earned.

8. That as a result of the accident complained of herein, the Plaintiff was caused to suffer, and will in the future be caused to suffer, great physical pain and mental anguish.

9. That as a result of the accident complained of herein, the Plaintiff was caused to expend, and he will in the future be caused to expend, large sums of money for medical expenses.

10. That as a result of the accident complained of herein, the Plaintiff was caused to be unable, and will in the future be unable, to perform his necessary and lawful affairs.

WHEREFORE, Plaintiff DEMANDS A TRIAL BY JURY and prays for judgment against the Defendant in the sum of One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00).

ROBERT T. GOODE,
JR.
By /s/ Eddie W. Wilson
Of Counsel

By /s/ Richard J. Tavss
Of Counsel

By /s/ Bruce A. Wilcox
Of Counsel

Eddie W. Wilson
MILLER, BONDURANT & WILSON, LTD.
706 London Boulevard at Green Street

Portsmouth, Virginia 23704

Richard J. Tavss
Tavss & Fletcher
Two Commercial Place
Norfolk, VA 23510

Bruce A. Wilcox
Tavss & Fletcher
Two Commercial Place
Norfolk, VA 23510

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

DOCKET NO. L-86-335

ROBERT T. GOODE, JR.,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY CO.,
Defendant.

MOTION TO DISMISS

Defendant, Norfolk and Western Railway Co., moves the Court to dismiss this action on the grounds that the Court is without jurisdiction of the subject matter, Congress having vested exclusive jurisdiction in the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C.A. § 901, *et seq.*

NORFOLK & WESTERN RAILWAY CO.

By /s/ John Y. Richardson, Jr.
Of Counsel

GROUNDS OF DEFENSE

Defendant, Norfolk and Western Railway Co., for its grounds of defense to the motion for judgment filed herein, comes and says:

1. That the allegations of paragraph 1 of the motion for judgment are admitted.

2. That the allegations of paragraph 2 of the motion for judgment are denied.

3. That the allegations of paragraph 3 of the motion for judgment are admitted.

4. That at the time of the accident complained of, plaintiff was engaged in maritime employment; defendant expressly requests a reply to this allegation of new matter.

5. That the accident and injury complained of occurred on the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel); defendant expressly requests a reply to the new matter alleged herein.

6. That with regard to the allegations contained in paragraph 4 of the motion for judgment, defendant admits plaintiff was injured on or about February 11, 1985 and was an employee of the defendant on that date, however, all other allegations are denied.

7. That the allegations of paragraphs 5, 6, 7, 8, 9 and 10 of the motion for judgment are denied.

8. That plaintiff was guilty of negligence which proximately caused or contributed to cause the action and the injuries complained of, and plaintiff failed to use due care to mitigate his damages. The plaintiff was not injured to the extent alleged and is not entitled to recover $1,250,000.00 or any other sum in this action.

9. That plaintiff has waived his rights to proceed against the defendant by his acceptance of benefits under the Longshoremen's and Harbor Worker's Compensation Act and has made a binding election of remedies.

10. That defendant reserves the right to amend its grounds of defense during discovery of this matter or at trial.

NORFOLK & WESTERN RAILWAY CO.

By /s/ John Y. Richardson, Jr.
Of Counsel

Edward L. Oast, Jr.
John Y. Richardson, Jr.
Williams, Worrell, Kelly & Greer, P.C.
600 United Virginia Bank Building
Norfolk, VA 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to Eddie W. Wilson and Richard J. Tavss, this 13th day of March, 1986.

/s/ John Y. Richardson, Jr.

PRESENT: All the Justices
OPINION BY JUSTICE RICHARD H. POFF
March 4, 1988

Record No. 841743

NANCY J. SCHWALB

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE
CITY OF NEWPORT NEWS
Douglas M. Smith, Judge

Record No. 850728

WILLIAM MCGLONE

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH
Lester E. Schlitz, Judge

In this appeal, we review two judgments entered in separate actions, each sustaining a plea to the jurisdiction. Claiming damages for personal injuries, each plaintiff had invoked the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) (FELA). In each appeal, the sole issue is

whether the plaintiff was a statutory employee as defined in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982) (LHWCA or the Act). If so, the parties agree that the remedy provided by the Act is exclusive, *see* 33 U.S.C. § 905(a) (1982), and that we should affirm the judgments.

The two plaintiffs are Nancy J. Schwalb and William C. McGlone. Each was an employee of the defendant, The Chesapeake and Ohio Railway Company. Although the accidents resulting in the plaintiffs' injuries occurred at different times, the facts in the two cases, insofar as relevant to the issue common to the two appeals, are substantially identical. Each plaintiff was employed as a laborer to perform housekeeping and janitorial services in the offices, shops, bathrooms, and other places situated on the defendant's pier and adjacent property in Newport News. This property is equipped with facilities designed to transfer coal from railroad cars to ships moored at the pier. A "dumper", activated by "trunnion rollers", upends railroad cars and dumps the coal into "hoppers". The coal falls from the hoppers onto conveyor belts that carry it to a "loading tower" from which it is poured into the hold of a ship.

Coal spilled on the trunnion rollers can cause the dumpers to malfunction. Coal falling and accumulating beneath the conveyor belts eventually may damage the belts and interrupt the loading process. As part of the duties assigned by the defendant, the plaintiffs were required to clear away coal spilled in these areas. Because they were not members of a longshoremen's union, the plaintiffs were forbidden to load that coal onto the conveyor belts. The plaintiff McGlone was clearing away coal beneath a conveyor belt at the time he was injured. The plaintiff Schwalb was injured in a fall as she was walking along a "catwalk" approaching the trunnion rollers.

The parties in both cases agree that the defendant railroad is a statutory employer as defined in the LHWCA, that is, an employer "any of whose employees are employed in maritime employment, in whole or in part". 33 U.S.C. § 902(4) (1982). The plaintiffs' contention is that the trial courts erred in ruling that they were statutory employees as defined in the Act. The plaintiffs rely upon our decision in *White v. N. and W. Ry. Co.*, 217 Va. 823, 232 S.E.2d 807, *cert. denied*, 434 U.S. 860 (1977). Reviewing a judgment based on such a ruling, we applied the Act as amended in 1972, Pub. L. No. 92-576, 86 Stat. 1251, to the facts in *White*. First enacted in 1927, Pub. L. No. 69-803, 44 Stat. (part 2) 1424, the LHWCA was the first successful congressional response to the Supreme Court's decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). There, the Court had ruled that a state worker's compensation act could not constitutionally apply to a longshoreman injured in an accident that had occurred on a gangplank between a pier and a ship. Initially, Congress sought to authorize states to extend their workers' compensation statutes seaward of the *Jensen* line, but the Court held the state statutes to be unconstitutional delegations of congressional power. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

Although the federal Act filled a workers' compensation void, the LHWCA, as originally enacted, provided coverage only when "disability or death result[ed] from an injury occurring upon the navigable waters of the United States". 33 U.S.C. § 903(a) (1927). Federal compensation coverage stopped at the *Jensen* line; the Act did not apply to a longshoreman injured at work on a pier, even though engaged in traditional longshoremen's functions. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 218-20 (1969).

The 1972 amendments to the LHWCA moved the *Jensen* line landward to include areas adjoining navigable waters and "customarily used by an employer in loading, unloading, repairing, or building a vessel". 33 U.S.C. § 903(a) (1982). Yet, Congress did not extend federal coverage to every worker injured in such areas, for it added an amendment defining a covered employee as "any person engaged in maritime employment." 33 U.S.C. § 902(3) (1982). The effect ofthe two amendments was to create a two-pronged coverage test—the situs of the injury and the status of the injured worker.

In *White*, a railroad employee filed a claim under FELA. He had been injured on a situs covered by the LHWCA, and "the critical question presented . . . [was] whether plaintiff was a 'person engaged in maritime employment' and thus an 'employee' within the meaning of the Act." 217 Va. at 827, 232 S.E.2d at 809. White was hired as an electrician to maintain and repair the electrical equipment used at a pier to dump coal from railroad cars, to move conveyor belts transporting the coal, and to load the coal into ships. Although White did not operate any of the equipment employed in the loading process, the railroad argued that "all of his activity was 'functionally related' to the loading of coal on ships", *id.* at 831, 232 S.E.2d at 812, and that he was, therefore, an employee engaged in maritime employment and, as such, was limited to the remedy provided by the LHWCA.

In *White*, the railroad had borrowed the "functional relationship" formula from the opinion in *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation*, 540 F.2d 629, 637-38 (3d Cir. 1976). Considering the history of the Act and construing the congressional intent underlying the 1972 amendments, we rejected that formula. We adopted, instead, the standard articulated in *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir.), *cert. denied*, 429U.S. 868 (1976)[1]:

---

[1] The Supreme Court disapproved application of a significant relationship standard to determine the status of the worker in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 302 n.8, 318-

> [F]or an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903.

Applying the *Gilmore* standard, we said that "we do not believe plaintiff's duties . . . had a realistically significant relationship to the loading of cargo on ships", that "plaintiff was not a covered 'employee' within the meaning of the Act", and that "the order dismissing plaintiff's FELA action will be reversed". 217 Va. at 832-33, 232 S.E.2d at 813.

In the appeals at bar, the defendant railroad relies on *Price v. Norfolk & W. Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980). There, the plaintiff in an FELA action was a painter employed by the defendant railroad. He sustained an injury while painting the support towers of a structure housing a conveyor belt system used in loading grain into the hold of a vessel. The *Price* court reasoned that, because "the failure to paint would eventually lead to severe rusting that would halt the entire [loading] process", *id.* at 1062 n.4, the plaintiff was engaged in maritime employment and, consequently, "was an 'employee' within the meaning

---

19 (1983). The Court did not, however, disapprove a significant relationship standard as a concept when applied, as in *Gilmore*, to post-1972 coverage landward of the *Jensen* line. As noted by the majority in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424 n.10 (1985) (quoting *Perini*, 459 U.S. at 299, 324 n.34) the decision in *Perini* "was carefully limited to coverage of an employee 'injured while performing his job upon actual navigable waters' . . . [and] was, 'of course,' limited to workers covered prior to 1972".

of the LHWCA which provides an exclusive remedy", *id.* at 1062.

We cannot agree that Congress intended the 1972 amendments to have such pervasive and preclusive effects. Nor do we agree with the argument advanced by the railroad in these appeals that the Supreme Court implicitly has overruled our decision in *White*. On brief, the defendant says that "the U.S. Supreme Court has stated that one is engaged in maritime employment if he is 'engaged in the *overall* process of loading and unloading vessels' (emphasis supplied)." For this proposition, the defendant cites *Northeast Marine Terminal Co. v. Caputo*,432 U.S. 249 (1977). The language the defendant quotes from that decision is an abbreviated excerpt lifted from a longer passage, the import of which we construe differently.

The injuries at issue in *Caputo* were sustained during the process of unloading a ship. Considering the reports of the congressional committees that initiated the 1972 amendments, the Court concluded that Congress intended

> to cover those workers involved in the *essential elements* of unloading a vessel—taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area . . . . [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered. Also excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo.

Id. at 267 (emphasis added). As we construe this language, the Court reasoned that, although clerical employees working on a covered situs may have responsibilities related to the commercial process, unless they are "engaged in the handling of cargo", they are not "involved in the essential elements of [loading or] unloading a vessel" and, therefore, are not statutory employees for purposes of the LHWCA. *Id.*

We recognize that the Act is remedial in purpose and, as the defendant says, that "*Caputo* requires an expansive view of LHWCA". We note, however, that the Court speaks of covered workers as those "involved in the essential elements of unloading a vessel", *id.*; as those "directly involved in the loading or unloading functions", *id.* at 271 (quoting S. Rep. 1125, 92d Cong., 2d Sess. 13 (1972) and H.R. Rep. 1441, 92d Cong., 2d Sess. 11 (1972)); and as those who "spend at least some of their time in indisputably longshoring operations", *id.* at 273. Two years following *Caputo*, the Court said that "workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82 (1979). And the Supreme Court, recalling the language of *Caputo*, emphasized in its most recent analysis of the status test that the purpose of the maritime employment requirement was "to cover those workers on the situs who are involved in the *essential elements* of loading and unloading". *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985) (emphasis added).

We believe the "essential elements" standard is more nearly akin to the "significant relationship" standard we adopted in *White* than the "overall process" construction invoked by the defendant. In this respect, we see no logical difference between workers "who perform purely clerical tasks", *Caputo*, 432 U.S. at 267, and workers who perform purely maintenance tasks, such as painting, or workers who, like the plaintiffs in these appeals, perform purely housekeeping and janitorial tasks.

Applying the rule in *White*, we hold that the plaintiffs were not statutory employees as defined in the LHWCA.

We will reverse the judgments dismissing the plaintiffs' FELA actions and remand the cases for trials on the merits.[2]

Record No. 841743 - Reversed and remanded.
Record No. 850728 - Reversed and remanded.

---

[2] In the Schwalb appeal, the defendant argues that the plaintiff "is estopped from denying LHWCA coverage" because she accepted compensation paid under the Act. According to the defendant's brief, "[s]he expresses no agreement to off-set compensation payments previously received against any recovery under FELA and, therefore, double recovery remains a possibility." But, in a memorandum of law filed in the trial court, we find that the plaintiff acknowledged that "any recovery by plaintiff on her FELA claim will be reduced by the amount of LHWCA benefits she may have already received." A railroad worker who makes such a concession does not seek a double recovery and is not precluded from pursuing a remedy under FELA. *Freeman v. Norfolk and Western Ry. Co.*, 596 F.2d 1205, 1208 (4th Cir. 1979); *accord Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1049 (4th Cir. 1980).

SEVENTH JUDICIAL CIRCUIT OF VIRGINIA
Newport News, Virginia 23607

August 8, 1984

Ms. Frances S.P. Li
Suite 565
608 2nd Avenue South
Minneapolis, Minnesota 55402

Mr. William W. Nexsen
Stackhouse, Rowe & Smith
P. O. Box 3570
Norfolk, Virginia 23514

Mr. Richard Wright West
West, Stein, West & Smith
P. O. Box 257
Newport News, Virginia 23607

Re: Nancy J. Schwalb v. The Chesapeake and Ohio Railway Company At Law No. 8827

Dear Counsel:

You will recall that on June 6, 1984, the Court heard argument on a special plea to jurisdiction in the above captioned cause. This special plea was filed by the defendant C&O, in which they contend that the plaintiff's sole remedy in this cause is under LHWCA and consequently this court lacks jurisdiction on the motion for judgment.

The Court heard evidence of witnesses, stipulations by counsel, has read the memorandums of law and cases cited therein and am rendering my decision by this letter.

The plaintiff and defendant both agree that to be covered under LHWCA an injured employee must meet both a situs and a status test, both sides agree that the situs

test has been met. This leaves as the only question involved whether or not the plaintiff employee is engaged in maritime employment and the Court holds that the plaintiff Schwalb is so engaged, as her duties were essential to the loading and unloading of coal by conveyor belt to the ships moored at the docks. It is uncontradicted that if the spilled coal was not removed that it could have haulted the process of loading the coal aboard the vessels. With the liberal interpretations expressed in decisions by the United States Supreme Court this Court has no difficulty in determining that the plaintiff's remedy is under the LHWCA. Therefore, the plea to the jurisdiction is sustained and I am requesting Mr. West to draw the appropriate order, noting plaintiff's exception and objection and having the order endorsed by opposing counsel and returning to the Court for entry.

Very truly yours,

/s/ Douglas M. Smith
Judge

THIRD JUDICIAL CIRCUIT
Circuit Court of the City of Portsmouth

May 29, 1985

Richard Wright West, Esquire
P.O. Box 257
Newport News, Virginia 23607

Russell N. Brahm, III, Esquire
P.O. Box 1138
Portsmouth, Virginia 23705-1138

Re: William McGlone v. Chesapeake and Ohio Railway Co. L84-327

Gentlemen:

Thank you for your excellent and most exhaustive memoranda. I have reviewed the pleadings, the evidence and the argument of counsel, and I have read the memoranda and all of the cases cited.

William McGlone, plaintiff, was injured at Newport News, Virginia, on February 1, 1983, and filed his Motion for Judgment against the Chesapeake and Ohio Railway Company, defendant, on May 31, 1983, under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51, *et. seq.* Defendant filed a special plea to the jurisdiction on June 24, 1983, on the ground that plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a).

A hearing on the special plea was heard by this Court on March 29, 1985, evidence taken and a transcript prepared. It appears from the evidence that plaintiff and employee of the Chesapeake and Ohio Railway Company on the date of the accident was working on the pier as a laborer cleaning up coal which had fallen from a conveyor

belt which was being used to load coal onto a ship at the pier. The hopper and conveyor belt is an extension of the pier. If coal is not removed in the area where the plaintiff was cleaning up, the coal would eventually interfere with the loading operation and bring it to a halt. This work was frequently done by the plaintiff. Plaintiff was injured by the conveyor belt while engaged in this work. The sole action involved here is whether the plaintiff at the time of his injury was working in a maritime capacity as defined by the LHWCA.

An injured employee must meet both a "situs" and a "status" test in order to be covered under LHWCA. There seems to be no question here that the injured [sic] occurred in a covered situs but we must determine whether plaintiff occupied a status covered under LHWCA. *Noqueira v. New York, N.H., and H.R. Company.* 281 U.S. 128, (1930).

The Court must resolve a conflict in the case law between a decision of the Supreme Court of Virginia, *White v. Norfolk & Western Railway Co.*, 217 Va. 823 (1977), *cert. denied*, 434 U.S. 860 (1977) and *Price v. Norfolk & Western Railway Company*, 618 F2d 105 (1080) [sic], decided by the Fourth Circuit Court of Appeals. In *White* the court stated at page 832:

> "Plaintiff was not actually handling any cargo either manually or mechanically, as was the case in the decisions principally relied on by N & W. Moreover, plaintiff was not manipulating (except to test) any of the controlls of the electrical mechanism, which furnished the power for this automated loading process. Rather, he was only maintaining the electrical device on the shore and attached to the pier, work which is not the traditional work of a ship's service employee. Plaintiff was at least one step removed from a realistically significant relationship and from a direct involvement with the loading of vessels.

> The mere fact that some of the plaintiff's cumulative injury was sustained out over the Elizabeth River while he worked inside the electrial rooms of the Pier 6 ship loaders, does not convert his status from that of a railroad electrician to that of a maritime worker."

It can thus be seen that the Virginia Supreme Court held that to qualify as an employee under LHWCA the plaintiff must have been directly involved in the loading of coal. Under this ruling plaintiff could not have been held to be an employee under LHWCA.

Price decided three years after *White* holds to the contrary.

The Fourth Circuit held that a railway employee who was injured while painting towers used in the loading of ships was an employee under LHWCA. The court held that merely because the employee was not directly involved in the actual loading of ships, this fact did not remove him from coverage under LHWCA because the maintenance of the towers was essential to the movement of maritime cargo and thus the employee was included in the broad concept of maritime employment.

This view has been upheld in many Federal court decisions. *See*: *Newport News Shipbuilding and Drydock Company v. Graham*, 573 F2d 167 (4th Circuit), *cert. denied*, 439 U.S. 979, 99 S.Ct. 563 (1978); *Northeast Marine Terminal Company v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977).

It will thus be seen that the Fourth Circuit has adopted a broad concept of maritime employment that maintenance of maritime cargo loading equipment is essential to the loading of cargo and is, therefore, included in the meaning of a person engaged in maritime employment under LHWCA.

White stands alone in contrast to the federal decisions which were decided after the decision in *White*.

Should this court blindly follow *White* because it is a State court decision, under the principle of *stare decises*? To do so would be to interpret a Federal law contrary to all of the decisions of the Federal courts which have declined to follow *White* and have disagreed with its results. It is the Court's belief that this conflict between the Supreme Court of Virginia and the Fourth Circuit Court of Appeals must be resolved in favor of the latter decisions of the federal courts and this Court reluctantly and respectfully declines to follow *White* since it feels the decision in *Price* is now controlling.

The Court is of the opinion that the plaintiff in this case, under the facts presented, was engaged in activity which made him an employee under the meaning of LHWCA, and that he is precluded from maintaining a FELA action in this case.

Defendant's special plea to the jurisdiction of this Court is sustained, and the plaintiff's Motion for Judgment will be dismissed from the docket.

Counsel for the defendant will prepare and circulate a sketch order in accordance with this letter and for presentment to the Court for entry.

Sincerely yours,

/s/ Lester E. Schlitz
Chief Judge

FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

November 13, 1986

Eddie W. Wilson, Esquire
2200 Colonial Avenue, Suite 12-B
P. O. Box 11168
Norfolk, Virginia 23517

John Y. Richardson, Jr., Esquire
Williams, Worrell, Kelly & Greer
600 United Virginia Bank Building
P. O. Box 3416
Norfolk, Virginia 23514-3416

Re: Robert T. Goode, Jr. vs. Norfolk and Western Railway Co. At Law No. L-86-335

Gentlemen:

Thank you for the help that you have given the court. I have studied all of the material supplied, including the opinions cited in your excellent briefs.

If this case were one of first impression, I would be tempted to rule that Congress, by enacting the Longshoremen's and Harbor Workers' Compensation Act (L.H.W.C.A.), did not intend to strip a railroader of any of his benefits under the Federal Employer's Liablility Act (F.E.L.A.) under any circumstances so long as he was working for the railroad at the time of injury, a narrow, unintellectual approach which makes good sense.

The duty of this court, however, is not to make law but to interpret and follow the law as set forth by courts of higher dignity. In following that duty, I feel that I am directed by the existing law to rule that, under the particular facts of this case, the motion for judgment must be dismissed for reason that exclusive jurisdiction lies within the ambit of the L.H.W.C.A.

Railroad cars filled with coal come cross country in both interstate and intrastate commerce and come to rest in what is called the barney yard located near pier 6 at the Lambert's Point terminal in Norfolk, Virginia. After the coal has come to rest in the barney yard, the process of loading the coal into vessels begins. The loaded cars are moved from the barney yard through a thawing shed, and are then pushed up a raised track by small locomotives called pushers onto the dumper located near the piers. As these loaded cars are pushed on to the dumper, their progress is slowed or stopped by equipment known as a retarder. The cars revolve, dumping the coal onto conveyor belts which deliver the dumped coal directly into the holds of waiting vessels docked at the piers. The empty cars are pushed to theapex of the raised track and then, through the force of gravity, are returned to a holding yard from where they will again be dispatched to coal fields located in various parts of the country.

The plaintiff was a machinist who was injured while repairing the retarder on the dumper located near pier 6. The dumper and retarder on which the plaintiff was working are located 500 to 550 feet from the water. Retarders are located throughout the railroad system; however, the sole purpose of this retarder was to stop the loaded cars on the dumper to facilitate the transportation of coal from shore to vessel by dumping the coal on conveyor belts which feed the coal into the belly of docked vessels at pier 6. The entire loading operation at pier 6 must cease when the retarder is inoperative or is being repaired, and the loading operation had in fact ceased at the time of the injury to the plaintiff.

Machinists may be assigned to what is known as the Motive Power Department which has the function of maintaining and operating the coal dumping facility of the railroad. Machinists may be assigned to different locations such as the 38th Street car shop or the roundhouse, which may be miles away from the water, or they may be assigned to Lambert's Point. The location is determined by seniority, and a machinist working at the pier at Lambert's Point may be forced to work at another location because of the electing of a more senior machinist to work at the pier. At the time of the accident, the plaintiff had been assigned for some time to work at Lambert's Point. While assigned to Lambert's Point, machinists spend the overwhelming portion of their working time maintaining and repairing machines and equipment essential to the coal dumping operation. Machinists do not, for example, regularly repair cars for that is the job of the train men. The great majority of the working time of a machinist while assigned to Lambert's Point is spent on the maintenance and repair of machinery which facilitates the dumping operation after the cars have left the barney yard. The machinists are required to pay into the railroad retirement plan and are subject to the Railway Labor Act.

Under the facts of this case, the railroad is an employer within the meaning of the L.H.W.C.A., *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 132, 44 L.Ed. 754, 50 S.Ct. 303 (1930), and the plaintiff is an employee within the meaning of the L.H.W.C.A., *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L.Ed. 2d 320, 97 S.Ct. 2348 (1977); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 62 L.Ed. 2d 225, 100 S.Ct. 328 (1979), and he cannot walk in and out of coverage because, I believe, that the overwhelming portion of his work is essential to the loading and unloading operation.

The Supreme Court in *Herb's Welding v. Gray*, ___ U.S. ___ , 84 L.Ed. 2d 406 (1985), while holding that a welder working on a fixed offshore oil-drilling platform was not engaged in maritime employment within the meaning of L.H.W.C.A., has stated:

> But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are *involved* in the *essential elements* of loading and unloading. (Emphasis added).
>
> We have never read 'maritime employment' to extend so far beyond those *actually involved in moving cargo between ship and land transportation*. (Emphasis added).

On the facts of this case, I hold that the plaintiff was involved in the essential elements of loading and unloading and that he was actually involved in moving cargo between ship and land transportation. After all, the entire loading operation ceased during the repair of the retarder on which the plaintiff was working when injured. The location of the retarder was on the dumper, and the sole purpose of this particular retarder was to stop coal-loaded cars so that the coal could be dumped onto the belts feeding the vessel. It must be remembered that plaintiff's supervisors testified that 99 percent of the work of a machinist assigned to Lambert's Point was the maintenance and repair of machines and equipment directly and solely related to the loading and unloading operation. Even the most biased witnesses could not seriously testify that less than 50 percent of the work was not so related, while the machinist was assigned to Lambert's Point.

The plaintiff places a great deal of emphasis on *White v. N & W. Ry. Co.*, 217 Va. 832 (1977), decided in the same year as *Conti v. N. & W. Ry. Co.*, 566 F.2d 890 (4th Cir.).

It is my belief that, under the facts of this case, the plaintiff did have "a realistically significant relationship to the loading of cargo on ships" and that he was directly involved in the process of loading coal on the vessels within the meaning of the *White* test. Furthermore, this case does involve a federal question, the federal authorities are therefore the more persuasive, and to the extent that *White* differs from significant federal decisions, the *White* court, in my opinion must yield.

As counsel well know, there have been a number of significant decisions subsequent to *White*, one of the leading decisions being *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir.1980). In my opinion, the *Price* court did set forth the proper test in determining whether there is exclusive coverage under the L.H.W.C.A., that test being whether the plaintiff's job was an essential element in the loading and unloading of the vessels. I hold that in this case the plaintiff's job was an essential element, although in light of the later ruling in *Herb's Welding*, supra, I would not hold that the painter's job in the *Price* case was an essential element.

I believe that *Newport News Shipbuilding & Dry Dock v. Graham*, 573 F.2d 167 (4th Cir.), cert. den., 439 U.S. 979, 58 L.Ed. 2d 649, 99 S.Ct. 563 (1978), fortifies my opinion in this case, and I do not think that this opinion is in substantial conflict with *Conti v. N. &W. Ry. Co.*, 566 F.2d 890 (4th Cir. 1977), although I do agree with the D.C. Circuit Court that even before *Herb's Welding*, supra, the Fourth Circuit had moved away from a test of balancing traditional railroad tasks against traditional maritime tasks. *Harmon v. Baltimore & Ohio RR.*, 741 F.2d 1398 (D.C. Cir 1984).

I am cognizant of my colleague's decision in *Evans v. N. & W. Ry. Co.* (Norfolk Circuit Court 1985), but likewise do not feel that we are in conflict. After a close reading of his decision, I believe that, under the facts of this case, Judge Clarkson would have reluctantly reached the same decision which I have reluctantly reached.

With regard to the situs test, I hold that the most important factor is the nature of the work rather than the distance from the water and that the test has been met. *Graham*, supra; *Prolerized New England Co. v. Miller*, 691

F.2d 45 (lst Cir. 1982); *Prolerized New England Co. v. Ben. Rev. Bd.*, 637 F.2d 30 (lst Cir. 1980), cert. den. 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed. 2d 952 (1981); *Sea-Land Serv. v. Director, etc.*, 685 F.2d 1121 (9th Cir. 1982); *Garvey Grain Co. v. Director, etc.*, 639 F.2d 366 (7th Cir. 1981).

I commend both counsel for their thorough preparation for the hearing and their excellent briefs.

Mr. Richardson may prepare the order for Mr. Wilson's endorsement. Please have the order forwarded to me prior to November 19, 1986, if possible.

Very truly yours,

Charles R. Waters, II
Judge

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS

LAW NO. 8827-S

NANCY J. SCHWALB,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A CORPORATION,

Defendant.

ORDER

On June 6, 1984 came the parties and their attorneys, and the Court heard evidence and the argument of counsel upon the defendant's Special Plea To Jurisdiction. And having further considered the memoranda of the parties and having maturely considered the same, the defendant's Special Plea to Jurisdiction is SUSTAINED for the reasons more fully set forth in the Court's letter opinion of August 8, 1984.

Accordingly, this action is DISMISSED with prejudice to the plaintiff.

DATE: 8-22-84
ENTER:

/s/ D.M. Smith
Judge

I ask for this:
/s/ Richard Wright West
Counsel for Defendant

Seen and exception noted:
/s/ William W. Nexsen
Counsel for Plaintiff

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF PORTSMOUTH
ON THE 13TH DAY OF JUNE, 1985.

LAW NO. L-83-327

WILLIAM C. McGLONE,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

ORDER

On March 29, 1985 came the parties and their respective attorneys, and the Court heard evidence and the argument of counsel upon the defendant's Special Plea to Jurisdiction. And having further considered the Transcript of the hearing conducted on March 29, 1985, the memoranda of the parties, and having maturely considered the same, the defendant's Special Plea to Jurisdiction is SUSTAINED for the reasons more fully set forth in the Court's letter opinion of May 29, 1985.

Accordingly, this action is DISMISSED with prejudice to the plaintiff. It is further ORDERED that the Transcipt of the evidentiary hearing be made part of the Record in this case pursuant to Rule 5:9 of the Rules of Court.

DATE:
ENTER: 6-13-85

/s/ W.H.O.
Judge

I ask for this:
/s/ Richard W. West
Counsel for Defendant

Seen and exception noted:
/s/ Russell N. Brahm III
Counsel for Plaintiff

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

Docket No. L-86-335

ROBERT T. GOODE, JR.,
Plaintiff,
v.
NORFOLK & WESTERN RAILWAY CO.,
Defendant.

ORDER

This day came the parties to this action, by counsel, pursuant to defendant's Motion to Dismiss on the basis that Congress has vested exclusive jurisdiction over this matter in the Longshoreman's and Harbor Workers Compensation Act, counsel having fully argued and briefed defendant's motion. The court has fully considered the evidence presented, the briefs and arguments of counsel and has filed its letter opinion dated November 13, 1986 which is incorporated by reference.

For the reasons set forth in the opinion letter, it is accordingly ORDERED that the motion be granted, and it is accordingly ORDERED that this action be DISMISSED WITH PREJUDICE, the plaintiff's exceptions being so noted.

Enter this Order: 12/17/86

/s/ Charles R. Waters, II
Judge

I ask for this:
/s/ John Y. Richardson, Jr. p.d.

Seen and Exceptions Noted:
/s/ Eddie Wilson p.q.
/s/ Bruce A. Wilcox p.q.

Filed March 4, 1988

SUPREME COURT OF VIRGINIA

Record No. 841743
Circuit Court No. L-8827-S

NANCY J. SCHWALB,
Appellant,

against

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Newport News on the 22nd day of August, 1984.

For reasons stated in writing and filed with the record, the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A Copy,
Teste:

/s/ David B. Beach
Clerk

Filed March 4, 1988

SUPREME COURT OF VIRGINIA

Record No. 850728
Circuit Court No. L-83-327

WILLIAM McGLONE,
Appellant,

against

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Portsmouth on the 13th day of June, 1985.

For reasons stated in writing and filed with the record, the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A Copy,
Teste:

/s/ David B. Beach
Clerk

April 22, 1988

SUPREME COURT OF VIRGINIA

Record No. 870252
Circuit Court No. L86-335/L2341-86

ROBERT T. GOODE, JR.,
Appellant,

against

NORFOLK & WESTERN RAILWAY COMPANY,
Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Norfolk on the 17th day of December, 1986.

Upon consideration of the record and briefs, and on the basis of *Schwalb v. C & O Railway Co.*, 235 Va. ___, ___ S.E.2d ___ (1988), the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A copy,
Teste:

David B. Beach, Clerk

By: /s/ Cynthia L. McCoy
Deputy Clerk

---

33 U.S.C.A. § 902 (West 1986).
Definitions

When used in this chapter—

* * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include—

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3) (as amended in 1972 by Pub. L. 92-576 but prior to the 1984 Amendments, Pub. L. 98-426)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C.A. § 905 (West 1986). *Exclusiveness of liability*

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

* * *

45 U.S.C.A. § 51 (West 1986). Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

* * *

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

LAW NO. 8827-S

NANCY J. SCHWALB,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Newport News, Virginia
June 6, 1984

Before:
HONORABLE DOUGLAS M. SMITH, JUDGE

[T:3] (The Court Reporter was duly sworn.)

Court: All right, who is the attorney representing Miss Schwalb?

WILLIAM W. NEXSEN, appearing for defendant.

Mr. Nexsen: Judge, I'm Bill Nexsen; I'm with the firm of Stackhouse, Rowe and Smith in Norfolk, and local counsel, and today we have Miss Frances Li, Frances with an E-S, Li with an L-I. Of the firm DeParcq, Perl, Hunegs, Rudquist and Koenig out of Minneapolis.

We would move her entrance pro hac vice for this purpose only. She would be lead counsel and would represent Miss Schwalb.

FRANCES S.P. LI, appearing for plaintiff.

Ms. Li: Thank you, your Honor.

Court: What's your last name please?

Mr. Nexsen: Mine?

Court: Yes.

Mr. Nexsen: Nexsen, N-E-X-S-E-N.

Court: All right, Mr. West, we're here on your motion, I believe in the special plea to the jurisdiction.

Mr. West: Yes sir.

Court: You want to call some witnesses?

Mr. West: Yes sir, Mr. Overman, Mr. Gross, Mr. McCarthy.

[T:4] Court: Come up, please.

(At this time, the witnesses were duly sworn.)

Court: You all want to separate them?

Mr. West: I don't care. Mr. McCarthy is the company representative. Mr. Overman is my first witness.

Court: Have a seat.

Mr. West: I don't know whether the Court wants any opening comment.

Court: Yes, you might make an opening, please.

Mr. West: We anticipate proving to the Court that Miss Schwalb, who was a laborer in the Mechanical Department in the C and 0 working in Newport News, that on the date of her accident, she would have been or is covered under the Longshoremen and Harbor Workers Compensation Act. I don't know how much dispute we have as to everything the C and O is required to prove under that act.

The last hearing we had was on the fourth floor in a similar type case and the Plaintiff stipulated that in that case, he was employed by the C and O on the date of the accident. I don't anticipate there's any problem with that. They conceded that the C and O was an employer, as defined in the act, and the fourth concession was [T:5] that the accident happened upon navigable waters of the United States, how that is defined in the Longshoremen and Harbor Workers' Compensation, I'm prepared to prove all three of them, plus of course the major problem in dispute here is whether she was an employee under the act, particularly I believe according to the status test.

Court: All right.

Mr. West: We're prepared to prove it all.

Ms. Li: We would stipulate the act, C and O was an employer under the Longshoreman's Act at the time of the accident, and we would stipulate too the Plaintiff was injured at the time of the accident, she was employed by the Defendant, C and O, and her injury was in the course of her employment.

However, we would not stipulate to the fact that the accident happened on navigable waters nor will we stipulate to the fact that she was a maritime employee.

Court: All right.

Mr. West: With that in mind then, the C and O will produce evidence as to both tests, the status test and the situs test as it comes under Section 905(a) of the Title 33 of the US Code.

Our evidence will show as a laborer, most of Miss Schwalb's job was to clean out coal, spilled coal from underneath the belts that take the coal from the [T:6] dumpers out to the ships. We will have some photographs to show the Court, show you the relationship of therelationship of the dumpers to the ships. The coal cars are brought into Newport News and down to the dumper where they are turned upside down, the coal falls into a hopper on to belts and the belts transport the coal out to a tower where they are put aboard ships. This is, the dumper we're talking about is part of the Pier 14 complex at Newport News and Miss Schwalb, at the time of her injury was on the way to clean out coal from under, what are referred to as trunnion rollers; trunnion rollers are what permit the dumper to turn upside down with a car inside of it.

And the coal, which accumulates in the vicinity of the trunnion rollers is not removed, the dumper is not going to turn upside down and the coal loading operation will have to cease.

We will also produce evidence with regard to what Miss Schwalb's job normally was, how much time she would normally spend in various types of activities and we anticipate also producing evidence to show that Miss Schwalb has received to date from the C and O, or at least through the end of May, $20,409.12 paid to her bi-weekly under the Longshoremen and Harbor Workers' Compensation Act, and other matters relating to her coverage under that act which is administered by the US Department of [T:7] Labor.

Court: All right. Who is your first witness?

Mr. West: Mr. Overman.

Court: Mr. Overman.

M. L. OVERMAN, called as a witness by the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q You're M. L. Overman?

A That's correct.

Q You're employed by the C and O?

A That's right.

Q In what capacity?

A Electrical foreman.

Q Mr. Overman, were you on duty on January 12, 1983 when Miss Schwalb was injured?

A Yes, I was.

Q In your position as foreman, which [T:8] department are you foreman of?

A Mechanical Department.

Q All right. Did Miss Schwalb come under you in the ordinary chain of command?

A Yes, she did.

Q Did you have occasion to talk to her on that evening when she came to work?

A I assigned her her task for the night.

Q Other than the fact that Miss Schwalb was to be furloughed at the end of that shift, was there anything that she was to do in the next eight hours from the beginning of her shift, that you would consider unusual or not typical of what she normally did when working in the area of the dumper and the pier?

A No.

Q What would you describe as Miss Schwalb's primary job as a laborer in the Mechanical Department working in the area of Pier 14?

A To clean spilled coal from under the belts, trunnion rollers, and off of the towers, loading towers.

Q On the—on January 12, 1983, did you receive a message that Miss Schwalb had been injured?

A I heard it on the radio.

[T:9]Q Did you then go to where she was.

A Yes.

Q Let me show you a photograph and ask you if you can identify what that depicts (indicating).

A Yes, this is a walkway between the hoppers leading to the trunnion rollers.

Q Is that where Miss Schwalb told you she had been injured?

A Yes.

Mr. West: We ask this be marked as Defendant's Exhibit Number One for purpose of this hearing.

(At this time, the photograph was received and marked as Defendant's Exhibit Number One.)

By Mr. West:

Q Now, let me show you two other photographs—let me ask you if you just recognize what's shown in those photographs?

A That's Pier 14, the dumper and tower. And the same here (indicating).

Mr. West: We ask these be marked.

(At this time, the two photographs were received and marked as Defendant's Exhibits [T:10] Numbers Two and Three.)

Mr. West: I ask that the one that has the B marked on it be marked as Defendant's Exhibit Number Two, and the following, Number Three.

Court: All right.

By Mr. West:

Q All right, now for the benefit of the Court and Miss Li, if she would like to see, I'm going to show you what you have identified or what has been marked as

Defendant's Exhibit Number Two and you've identified as Pier 14. Can you show the Court where in that photograph is what is depicted in Defendant's Exhibit Number One. This walkway.

A Yes, it's here in the center of the dumper, center of the dumpers.

Q Would you show the Court where the dumpers are?

A Right here (indicating).

Court: Okay.

A This is the dumper.

Court: That's where it turns it, the car over?

A Yes. This is operator's cab and the walkway is right below it.

Court: Okay.

[T:11] By Mr. West:

Q The walkway is not shown in this photograph?

A No.

Q Underneath the dumper?

A Right.

Q When a car is brought up and turned upside down on the dumper, can you use Photograph Number Three and show the Court what happens to that coal?

A The coal flows by gravity down to feeders that—put it on to the main belts that run out the pier and up on the loading towers and into the ship.

Mr. West: That's all I have of Mr. Overman. Answer Miss Li, please.

CROSS EXAMINATION

By Ms. Li:

Q Mr. Overman, as for Miss Schwalb's primary duties, did you assign her part of that job, sweeping the floors of the office and the yard and other areas as well?

A It takes about 45 minutes in the morning before quitting time.

Q Would you describe the areas of the [T:12] sweeping that she was assigned to do?

A You mean the size of the area or where it is?

Q Where.

A It's the mechanical office that sits near the bulkhead and the shop is directly behind it.

Q Any other areas?

A There's three—the office and the shop and—ordinarily, the third shift laborer where she was working, would sweep out the office, and the eating area next to it. That's called the lunch—in the locker room. That's just before quitting time.

Q Her job as a laborer, that is an unskilled job, is that right?

A Yes, that's it basically.

Q And her duties did not involve the actual loading of coal, did it?

A Well, without her job, loading couldn't continue.

Q You didn't answer my question.

A All right.

Q Did it involve the actual loading of coal?

A No, no.

Q Did it involve the actual unloading [T:13] of coal?

A No.

Q Did her duties involve the operating of the loading machinery and equipment?

A No.

Q She was never required to go aboard the ship as part of her duties, is that right?

A Laborers have been, but she wasn't.

Q That's who I am directing my questions to. Miss Schwalb's duties.

A No.

Q She was never required to go aboard a ship?

A No.

Q Her primary duties then was general clean-up, is that right?

A Clean-up of trash coal. You see, we have other laborers that ordinarily clean the locker rooms and equipment. This is just something for general housekeeping before the next shift comes on.

Q Do you know which Union she belongs to?

A Unit?

Q Union.

A Union?

[T:14]Q Yes.

A Laborers' Union.

Q Do you have the name?

A Oh, no.

Q That is not a Longshoremens' Union in any event, is that right?

A Not that I'm aware of.

Q She was governed by the same operating and safety rules that would govern other laborers in the C and O system, is that correct?

A Yes, I'd say so.

Q As foreman, who assigned duties to the laborers under the Mechanical Department, you would agree that keeping the facilities clean would be one of the functions of the C and 0 Railroad, is that right?

A Keeping the facilities clean?

Q Clean-up, yes.

A Yes.

Q That includes not only the piers. but the office, the yards, the junctions and areas in the railroad facilities, is that correct?

A Are you talking laborers in general, or her specific job?

Q I'm talking in general.

A In general, laborers do, yes.

[T:15]Q And this clean-up duties then is not unique to the pier area, is that right?

A Well, that's the only place they clean up trash coal.

Q Her duties did not include only cleaning up trash coal?

A Laborers can be assigned to various duties.

Q I understand that.

A For instance, one man is assigned, one laborer is assigned to just clean the locker rooms, but if a person is assigned to a certain section, each night or each shift, then that's his job for that shift.

Q The laborers' clean up duties that involved, they involved the whole facility, not only just on the pier?

Mr. West: I think—my problem is we're going back and forth from what Miss Schwalb's duties were as opposed to what a general laborer's duties is. I don't think Mr. Overman understands when the switch is made.

Court: Let's make it clear, when you're talking about laborers in general or talking about Miss Schwalb.

Ms. Li: I'm talking about clean-up duties in general.

[T:16]A The clean-up duties of laborers are the position to which they are assigned.

By Ms. Li:

Q The clean-up duties of laborer include the whole facility, is that right?

A Just the Mechanical—the Mechanical Department laborers have an assigned section they clean. The transportation has their own laborers that clean other sections.

Q How far in terms of feet or yardage is the dumper from the shore line on water edge?

A Not more than three hundred foot, I would think.

Q And how far is the pier, specifically Pier 14, how long is that pier?

A Mr. Gross could probably could answer that. I really - I'd say probably 1200 foot, but that's a guess. I've seen it, but I can't remember.

Ms. Li: That's all I have. Thank you.

REDIRECT EXAMINATION

By Mr. West:

Q Mr. Overman, let me ask you a couple [T:17] of more. Now, I'm confining my questions to the specific duties of Nancy Schwalb. Did she have any laboring duties at a junction?

A No sir.

Q Did she work up in the yards?

A No.

Q On this particular evening that she was injured, let me rephrase that. You mentioned before in answer to Miss Li's question and in answer to mine, that the sweeping duties in the office and the eating area, the machine shop, would consume about 45 minutes?

A That's right.

Q Is that 45 minutes out of an eight hour shift?

A Yes.

Q What would she be doing in the other seven hours approximately, seven hours and 15 minutes?

A Other than 20 minutes for lunch, she would be cleaning coal.

Q Now, would this be between the dumper and the end of the pier?

A Right.

Mr. West: That's all I have.

RECROSS DIRECTION [sic]

[T:18] By Ms. Li:

Q One more question. When you say clearing coal, can you describe in more detail? How does she clear coal?

A They have a shovel and they also have a scraper, a piece of metal attached to the rod that they rake the coal.

Q And what happens to the coal?

A The coal falls to the dock where it's cleaned up again. Put back on the belts.

Q She had no duties as far as putting the coal back on the belt?

A No.

Ms. Li: That's all I have. Thank you.

Mr. West: As a matter of fact, Mr. Overman, once a Mechanical Department laborer takes the coal and puts it on the ground, because of Union restrictions, she is not permitted to pick that coal up off the ground, is she?

A That's right.

Mr. West: It's the laborer in the Transportation Department that has to come and do that?

That's correct.

Court: No wonder we lose money at the [T:19] ports. You can step down.

Mr. West: Mr. Gross.

W. C. GROSS, called as a witness by the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q You're W. C. Gross, is that correct?

A That's correct.

Q And you're employed by the C and O?

A Yes sir.

Q In what capacity?

A General foreman, Mechanical Department at the coal piers.

Q Does that put you just over top of Mr. Overman in the ordinary chain of command?

A Yes sir.

Q And you work at the coal piers at Newport News?

A Yes sir.

[T:20]Q Mr. Gross, could you give us your estimate of the distance between dumpers at Pier 14 and the edge of the water of the James River?

A I'd say approximately 300 feet.

Q Would you describe the area between the dumper and the water's edge as an extension of Pier 14?

A Absolutely.

Q I want to show you these photographs we talked about before. You have some familiarity with the area that Miss Schwalb said she was injured at?

A Yes sir.

Q That's shown in Photograph Number One?

A Yes sir.

Q Can you also show the Court in Photographs Two and Three, where the walkway shown in Photograph Number One is located?

A This area of the dumpers right here (indicating).

Q Can not be seen in the photograph?

A Can not be seen in the photograph.

Q And on Photograph Number Three, can you show it?

A The same general area, but can not be seen in this photograph.

Q The distance between where Miss [T:21] Schwalb was injured and the edge of the water is approximately 300 feet?

A I would say so.

Q Are you—we've spoken before of the trunnion rollers which is what Miss Schwalb was on her way to clean coal from beneath. What are the trunnion rollers?

A Trunnion rollers are what support the dumper on the end ring of each dumper, there's a rail and this rail rolls around these trunnion roller wheels in order for the dumper to turn over.

Q And how does the coal get there such as Miss Schwalb was on the way to clean out?

A Well, it's one of those unavoidable spills that gets in between the dumper and down in the trunnion rollers and it's necessary to clean this coal out for the operation.

Q Does the spill occur when coal is being loaded aboard ships?

A Yes sir, when the cars are turned over and the coal falls out of the cars.

Q Now, if no one was assigned the duty of removing spilled coal from the area of the trunnion rollers, what would be the effect—be the effect, if any, on the coal loading operation?

[T:22]A Well, it very seriously effects the operation because the dumpers are not free enough to turn and it also causes undue repair.

Q Are you familiar with whether coal was in fact being loaded off of Pier 14 at the time Miss Schwalb was injured?

A I don't quite follow that.

Q Do you know whether coal in fact was being loaded aboard?

A No, I don't know. I wasn't on duty.

Q You are familiar with the ordinary tasks of someone performing the job that Miss Schwalb was performing January 12, 1983?

A Yes sir.

Q Can you give us your best estimate of the percentage of time that a laborer would be removing spilled coal between the dumper and the end of the pier during an eight hour shift?

A I'm sure it's in excess of fifty percent of the time. If the pier is operating; on the opposite side, it's not operating, they have duties to pull this coal away from under belts and trunnion rollers on the opposite side and the side that is operating, at various times during the shift, it's necessary to pull these rollers or get this coal under these trunnion rollers on the side that is operating.

[T:23]Mr. West: Answer Miss Li, please.

CROSS EXAMINATION

BY Ms. Li:

Q Mr. Gross, the dumper is not located on the pier, is that right?

A It's not on the pier itself, no.

Ms. Li: May I have one moment, your Honor.

(At this time, Ms. Li conferred with Mr. Nexsen.)

Ms. Li: That's all I have.

Court: All right, thank you, sir. You may step down.

Mr. West: Mr. McCarthy.

JOHN F. McCARTHY, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

[T:24]Q Tell us your name, please.

A John F. McCarthy.

Q Employed by the C and O?

A Yes sir.

Q In what capacity?

A My title is Senior Claim Agent.

Q In that capacity, have you handled the claim of Miss Schwalb against C and 0 for injury on January 12, 1983?

A Yes sir.

Q I hand you a document and ask if you can identify it?

A Yes, that's the Longshoreman Harbor Workers' Form LS201 which is the employee's first notice of injury.

Mr. West: I ask that be marked as Defendant's Exhibit Number Four.

(At this time, the document was received and marked as Defendant's Exhibit Number Four.)

By Mr. West:

Q Is Exhibit Number Four one of the initial documents that are filed with the US Department of Labor to bring the claim under the Longshoremens and Harbor Workers' Compensation Act?

[T:25]A Yes, it is.

Q Would you read in item 17 over the signature of Nancy Schwalb and the date of January 14, 1983, what that says?

A "I am requesting the employer named in item seven to provide me appropriate compensation and medical care for my injury and I hereby make claim for all benefits to which I may be entitled under the Longshoremen and Harbor Workers' Compensation Act or a related law."

Court: What paragraph was that?

Mr. West: 17.

By Mr. West:

Q And under that act, has the C and O paid monies to Miss Schwalb since the date of her accident?

A Yes sir.

Q Payments every two weeks?

A Bi-weekly payments.

Q And through May 29, 1984, how much money has the C and O paid to Miss Schwalb under the act?

A $20,409.12.

Q Are payments current?

A Yes.

Q She still is receiving payments?

A That's correct.

Q Does the US Department of Labor [T:26] under this act have a rehabilitation program?

A Yes.

Q Are you familiar whether Miss Schwalb was in contact with the US Department of Labor to obtain rehabilitation services?

A Yes, I have received correspondence from the office of Workmens' Compensation Program, Miss Schwalb has been in contact with Mr. Gerald Wright, who is the rehabilitation specialist for the Workmens' Compensation Programs.

Mr. West: Answer Miss Li.

Ms. Li: I have no questions.

Court: Thank you, sir. You may step down.

Mr. West: That's the Defendant's evidence in support of its special plea.

Court: The Defendant rests.

Ms. Li: Your Honor, I'd like to call Miss Nancy Schwalb.

Court: All right.

NANCY SCHWALB, called as a witness in her own behalf, having been duly sworn, testified as follows:

[T:27] DIRECT EXAMINATION

By Ms. Li:

Q Your name is Nancy Schwalb?

A Yes.

Q And you're the Plaintiff in this case?

A Yes.

Q You were injured on January 12, 1983 while you were performing duties for the C and 0 Railroad?

A Yes.

Q Would you please tell the Court the duties that you were assigned to, that night?

A That night I was assigned, they had just shut down the coal pier, so I was assigned to do a specially thorough cleaning of trunnion rollers, make an inspection of the tower, and continue the duties that I have every night, which were sweeping the shop, sweeping the locker rooms, sweeping the office, the oil house, and the lunch area.

Q Let me back up a bit. What shifts did you work?

Q The third shift.

Q That is from what hours?

A 11 p.m. to seven a.m.

[T:28]Q Would you please tell the Court how much time you spent in—on an average day, how much time you spent on a given job you just described?

A Okay, they had just—well, the jobs clearing the coal from the tower and the dumper only take, combined, only take an hour or two in the shift. And then they had, just because of that, just assigned several other clean-up duties to the third shift laborer in order to fill out the shift. So they had filled out the shift with about another six hours of sweeping up and cleaning up in the locker rooms, in the office and in the shop.

Q Did your duties include work on the pier?

A Not on the—walk out to the pier to get to the tower.

Q The tower is on the pier?

A Yes.

Q How much time do you spend working or clearing coal from the tower?

A Well, the job that I do on the tower is mostly cleaning the coal from underneath the shuttle belt and that can only be done when the machinery is not running. They only shut the machinery down for half an hour during the shift change so it's only about a half hour that I spend on the tower.

[T:29]Q How about working on the dumper area?

A The dumper area, it takes an hour to two hours.

Q And the remaining time of your work, you're involved in what?

A Sweeping and cleaning, like I said, there had just been normally the laborers didn't have much to do on the third shift, so they had just filled out the duties of the third shift laborers with a lot of clean-up duties.

Q At the time of your injury, were there loading activities on Pier 14?

A No. They weren't loading any coal. They had just shut down.

Q Where you ever assigned to load or unload coal?

A No.

Q Were you ever assigned to operate any of the machinery?

A No.

Q Which Union do you belong to?

A The International Brotherhood of Firemen and Oilers.

Q And is that a Railroad Union or Longshoremens' Union?

[T:30]A Railroad Union.

Q Have you ever been aboard a ship?

A No.

Q You received Longshoremen Workers' Compensation, is that right?

A Yes.

Q Do you have any other income aside from that benefit?

A No.

Q Tell me why did you accept the benefits?

A Well, I started getting the checks before I had gotten a lawyer, and I had no idea that I had any choice other than that, and I had no income whatsoever. I had been in the hospital for a while and I had a lot of bills to take care of, and I needed it just to live on.

Ms. Li: That's all I have. Thank you.

CROSS EXAMINATION

By Mr. West:

Q Miss Schwalb, are you willing to give the C and 0 back its $21,000 approximately that you received over the last better than a year?

[T:31]A If they would give me some other form of compensation, yes.

Q I see. Have you seen Exhibit Number Four, the document L-201 Form?

A Yes.

Q Is that your signature on there?

A I believe so, but on January 14, I was still in the hospital.

Q In fact, January 14, you came back to the C and 0 and filled out your required accident report, didn't you?

A From my medical records, I was still in the hospital.

Q Let's not talk about your medical records. Let's talk about what you remember. Did you sign out of the hospital for a short period of time while you were in it and come back to the C and 0 and fill out your accident report form?

A No.

Q You did not? Is this your signature or is it not?

A I'm pretty sure that's my signature, but I know I was in the hospital on the 14th.

Q With everyone of those checks you received over the past almost a year and a half, you get a [T:32] letter that's signed by Mr. McCarthy, don't you?

A Yes.

Q That letter tells you this check is payment for you under the Longshoremen and Harbor Workers' Compensation Act?

A Yes.

Q And you received, when did you hire a lawyer?

A Several months after I had been injured.

Q So you received a fair number of these checks since you hired a lawyer?

A Yes.

Q Did you ever send any of them back?

A I can't.

Q You can't send them back?

A No, I have nothing to live on other than those checks.

Q I understand. You think you're different than any other employee injured while working for the C and O?

A I don't understand what you mean.

Q Well, a lot of people do get injured while working for the C and O, have no source of income and don't get paid under the Longshoremens' Act; do you feel you're entitled to more than those people?

[T:33]A No.

Q Your attorneys have never told you to send one of these checks back, have they?

A No.

Q In fact, during the—since the date of your accident, you have changed your residence—your mailing address, have you not?

A Yes.

Q You went to Mr. McCarthy, asked him to change the address for you to receive the checks?

A Yes.

Q And on two occasions, the checks got lost in the mail, I believe. You went to Mr. McCarthy, told him you wanted new checks issued?

A Yes.

Q And he did?

A Yes.

Q Would you take either Exhibit Two or Three, the overall aerial views. Let's take Number Two. I assume you recognize what's shown in that photograph?

A Yes.

Q Would you show the Court where the office is that you sweep?

A This brick building here (indicating).

Q Would you say that the total size [T:34] of that office is slightly bigger than this Courtroom?

A Around the same size.

Q And where it's showing—show where the locker room is?

A The building right to the left (indicating).

Q How does the size of the interior of the locker room compare with the size of this Courtroom?

A Around the same size. Slightly bigger.

Q And how about the shop, would you show the Court where the shop is?

A This building here (indicating).

Q How big is the shop compared to the size of this Courtroom?

A I think it's a little bigger.

Q Okay. Would you say that it is accurate to describe the total area of the shop, the locker room and the office, as being say, four times the size of this Courtroom?

A Yes, for those three buildings, yes.

Q And each night you sweep them out?

A Those and two others.

Q And two others?

A Yes.

[T:35]Q What are the other two?

A The oil house.

Q How big is the oil house compared—

A The oil house is smaller than the Courtroom.

Q Can you show the Court where the oil house is?

A This building here (indicating). My duties were never more than sweeping it. And then another locker room. This other building here.

Q All of those in the same proximity to each other, doesn't require long walk to get from one to the other?

A No, my duties in those two buildings required more than sweeping.

Q Total of six hours you spent in those areas?

A Yes.

Mr. West: That's all I have.

REDIRECT EXAMINATION

By Ms. Li:

Q What other duties besides sweeping were you engaged in in those two buildings?

[T:36]A Well, in the oil house, I had to clean up any spilled oil which takes quite a while and then in the women's locker room, I had to do a complete clean up, I had to clean the sinks, commodes, showers, floors, that's about it in the women's locker room.

Q You work on the third shift, is that right?

A Yes.

Court: I'm sorry. What was the question?

By Ms. Li:

Q You worked on the third shift, is that right?

A Yes.

Q Did the—was there—excuse me, was there coal being loaded on an average third shift, not on the day of the accident, but on the third shift?

A Yes.

Q And when coal was being loaded,you would not be able to work underneath the trunnion rollers, is that right?

A No, I could work under the trunnion rollers when the coal was being loaded, but I couldn't work on the tower or on any of the belts.

Ms. Li: That's all I have.

[T:37] RECROSS EXAMINATION

By Mr. West:

Q Miss Schwalb, where does the spilled coal come from?

A From the coal cars in the trunnion rollers comes from the coal cars.

Q This occurs when the coal cars are turned upside down and the coal is dumped into the hoppers?

A Yes.

Mr. West: That's all I've got.

Ms. Li: Thank you.

Court: Would you say that—how many days a week do you work?

A Five.

Court: Of those five days a week, how many of those five days do you work six hours cleaning, sweeping,cleaning up oil, 20 minutes for lunch, which leaves you an hour and 45 minutes to do coal, how many days do you do that?

A All five.

Court: All five?

A Yes, I formerly had a job that was nothing but sweeping the shop, took an eight hour shift on the former job of mine.

[T:38] Court: All right. Thank you. All right, anything else, Miss Li?

Ms. Li: Not for evidence, your Honor, unless you—you would hear some oral argument.

Court: All right. All right, Mr. West.

Mr. West: I'd like to bring Mr. Overman back to make a point.

Court: All right.

* * *

M. L. OVERMAN, recalled as a witness by the Defendant in rebuttal, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q Mr. Overman, to your knowledge, as foreman in the Mechanical Department of C and O at Newport News, in January of 1983, did you have any laborer in your department working the third shift who spent six hours of eight hours sweeping up and cleaning up in an oil room?

A No, that—I mean—I wouldn't—no.

[T:39] Mr. West: That's all.

Court: All right.

Ms. Li. No questions.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH

LAW NO. L-83-327

WILLIAM T. MCGLONE,
Plaintiff,
v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS
Portsmouth, Virginia
March 29, 1985

Before:
HONORABLE LESTER E. SCHLITZ, CHIEF JUDGE

• • •

[T:13] ROBERT E. LAYNE, JUNIOR, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

RICHARD WRIGHT WEST, appearing for defendant.

By Mr. West:

Q State your name, please.

A Robert E. Layne, Junior.

Q And by whom are you employed, Mr. Layne?

A By the Chessie System.

Q And what is your position with Chessie?

A Electrician.

Q And what department do you work in at Newport News?

A Mechanical Department.

Q Do you know the Plaintiff, William McGlone?

A Yes sir, I do.

[T:14]Q He works also for C & 0?

A He did at the time, yes.

Q All right. You mean at the time of his accident?

A Yes.

Q What was his job?

A He was a laborer to clean up spilled coal around the belts on the towers.

Q What was his—what department did he work in?

A He worked in the Mechanical Department.

Q Did he work under you?

A Yes, he did.

Q Was he working under your authority on February 1, 1983, when he was injured?

A He was.

Q Would you tell the Court where he was working when he was injured?

A He was under the dumper cleaning coal off of the belt between one and three main belts.

Q What would you describe as Mr. McGlone's primary job as a laborer in the Mechanical Department at Newport News?

A His primary job was to keep, [T:15] clean up spilled coal.

Q Where would this spilled coal be located?

A Well, between the belts under the dumpers and on the towers.

Q What percentage of an average eight hour shift would you say Mr. McGlone would spend in cleaning up spilled coal between the dumper and the towers?

A I would say a little over fifty per cent of his time was contributed to that.

Q I'm going to show you a photograph, and ask if you can identify what's shown. Show it to Mr. Brahm first.

(At this time, the photograph was shown to Mr. Brahm.)

By Mr. West:

Q Can you identify what's shown on the photograph?

A These are the dumpers that—where they dump the coal for loading the ships at Pier Fourteen.

Mr. West: I would ask that be marked as Defendant's—

Court: I'll mark it as Defend[T:16]ant's Exhibit Number One for the purposes of this proffer.

(At this time, the photograph was received and marked as Defendant's Exhibit Number One.)

By Mr. West:

Q Now, if we can get it so you can show the Judge what you're talking about. Can you stand up, Mr. Layne?

A Sure.

Q In this fashion, would you show the Court where the towers are?

A Well, this is your loading tower right here (indicating).

Q What is this water?

A This is the river.

Q Which river?

A James River. This is the pier.

Q What does the tower do; what's its purpose?

A The purpose of the tower is to distribute coal all over the ship or barge, whichever it may be.

Court: Who employed this man, [T:17] do you know?

A Who employed Mr. McGlone?

Court: Yes.

A C & 0.

Court: C & 0 Railroad?

A Yes.

By Mr. West:

Q What is the tower located on?

A It is located on the pier itself.

Q All right. Would you show the Court, use it with this pen, by drawing an arrow, well, first, can you see in this Exhibit Number One the place where Mr. McGlone was when he was injured?

A Not according to this picture, you can't see. But you can get the vicinity in which he would be.

Q Why is it you can't see it on this photograph?

A Because he is on ground level, and you can't see through all of that.

Court: You say ground level?

A In other words—

Court: What was under his feet, dirt or piling or what?

[T:18]A No, concrete.

Court: Concrete?

A Yes sir.

Court: Is that concrete on land or water?

A Land.

By Mr. West:

Q Would you draw an arrow to the location which is shown above where Mr. McGlone was when he was injured?

A Mr. McGlone was under -

Q Under where you show it?

A Under where the arrow is shown, yes.

Q What is the—what is around that, what is this long thing, both of them next to the end of that arrow?

A This is the incline; these are the dumpers right here, and this is the operator's cab (indicating).

Q Would you explain to the Court, using this photograph, how coal is—how coal gets from coal cars, railroad coal cars onto, say, this ship or barge that's shown in the photograph?

[T:19]A Well, the cars are pulled up this incline, placed on the dumper, turned completely over, into a hopper, which is fed out to the—on the main belts.

Q Where are the main belts?

A This—are your main belts right here (indicating). This is number one and number three (indicating).

Q When the cars are turned over at the dumper, and the coal, by gravity, is dropped down, is it one continuous movement in there to the ship?

A Yes, it is.

Court: All right, sir.

By Mr. West:

Q Now, what is the distance, if you know, from the place where Mr. McGlone was injured to the edge of the water of the James River?

A I would say between two hundred fifty to three hundred feet.

Q Okay. And tell us specifically what it was that Mr. McGlone was doing when he was injured?

A Well, there was some spillage of coal between the belts and the ground, which would shift the belt over and make it run to one side, which would cause more spillage. And he was cleaning that coal out at the time, and he got his arm caught in the belt and the roller.

[T:20]Q Was coal being loaded aboard a barge at the time this happened?

A I do believe it was a barge.

Q Some sort of a vessel?

A Either—I would say there was s ship on one side and a barge on the other.

Q All right. Now, what would occur if the spilled coal in this instance would not be removed?

A Well, you would have damage to the belt, and you would eventually have to shut down your operation to clean it up, which would take twice the time delay.

Q Did Mr. McGlone, while working under you, have any duties that were away from the pier area?

A Not while working for me, he did not.

Q Ever work up in the general yard?

A Not for me, he didn't.

Court: Who do you work for?

A I work for the C & 0.

By Mr. West:

[T:21]Q Did Mr.—was Mr. McGlone ever called upon to clean an office or empty trash cans?

A Only on occasions when there was no ship or coal to be cleaned up, he would be asked to sweep the office floor or empty the trash can.

Q Routinely, without specific instructions, would Mr. McGlone's duties include cleaning up an office or emptying trash cans?

A No.

Mr. Brahm: Is that while working for you or working for other people?

A Well, any time.

RUSSELL N. BRAHM, III, appearing for plaintiff.

Mr. Brahm: How can you say what other people—

A I can't tell what the other man -

Court: You'll get a chance to cross examine him.

By Mr. West:

Q Talking about this job, Mr. McGlone was performing and had performed before—

A Right.

Q Did it include as a routine, without specific instructions, cleaning offices or trash cans?

A No, it was not a routine job.

[T:22]Q Do laborers, such as the job Mr. McGlone had, ever go aboard ships?

A On special occasions they may be asked to go to clean coal off of a beam on the boom.

Q So, again, that would be cleaning spilled coal?

A That's cleaning spilled coal.

Mr. West: Answer Mr. Brahm, please.

CROSS EXAMINATION

By Mr. Brahm:

Q Mr. Layne, you worked for the railroad about thirty-eight years, haven't you?

A Yes.

Q You consider yourself a good employee, don't you?

A I hope so.

Q Okay. How long did Mr. McGlone work for you, sir?

A Maybe three or four months.

Q Okay. So you don't know really what he did prior to that three or four months, do you?

A Well, I had seen him around.

[T:23]Q But you don't know what his specific duties because he worked for someone else, isn't that true?

A He did.

Q Now, isn't it true that when Mr. McGlone was injured the belts were running at that time?

A Yes.

Q Are you familiar with the Safety Rule 196, sir?

A Yes sir.

Q I show you Rule 196, and ask you if you can read it for the record, please.

A "Before performing"—

Mr. West: We would note our objection to the evidence, whether we violated the safety rule or not, has nothing to do with the issue of Longshoremen's and Harborworkers' Compensation Act.

Court: Overrule your objection, and allow you to read it in the record for a proffer.

A "Before performing any work on conveyor belts or rollers or stepping on or across belts, employees must take necessary precautions to assure that such equipment is stopped and that movement is not resumed until work has been completed and all employees are in the [T:24] clear."

By Mr. Brahm:

Q You were with Mr. McGlone at the time he was injured, isn't that true, or shortly before that time?

A Yes, I was.

Q And you instructed Mr. McGlone to clean out underneath the belt while it was moving, did you not?

A I asked him to clean the coal out, yes, I did.

Q And the reason why the belts were moving was because the belts were indirectly loading the barge Maryland or that other ship at that time?

A True, they were directly loading the ship.

Court: Did he have anything to do with the actual putting the coal on the belt, or was he just cleaning it out when it dropped off?

A No sir, he does not have anything to do with putting it on the belt.

Court: He wasn't loading that coal; he was cleaning up the debris?

A He was cleaning it up.

Court: All right, sir.

[T:25] By Mr. Brahm:

Q And he doesn't put that coal he cleans up back on the belt, does he?

A No sir, that comes under another department.

Q Now, you never saw Mr. McGlone go aboard a ship, did you?

A No, I can't say that I have.

Q You never ordered him to go aboard a ship, did you?

A No.

Q You never ordered him to clean any spilled coal from any of the ships, did you?

A No.

Q When was it you first learned that Mr. McGlone was injured?

A When we heard him holler.

Q What did you do then?

A We went around to see what was the trouble.

Q Did you have the belt cut off?

A Well, at the time I couldn't say that they were or they weren't. I really don't remember.

Q But the belts were running at the time Mr. McGlone was injured?

[T:26]A Right.

Mr. Brahm: I don't have any other questions.

I do have one other question.

By Mr. Brahm:

Q Can you identify this (indicating)?

A No sir, I've never seen it before.

Mr. Brahm: Okay. I would like to offer this as—

Court: What is it? If he hasn't seen it, how can you offer it?

Mr. Brahm: Notice to employees under coverage of the Longshoremen's and Harborworkers' Compensation Act.

Mr. West: We object.

Court: Are you going to be a witness to testify what this is?

Mr. Brahm: From a negative—

Court: I sustain the objection.

Mr. Brahm: I was just going to say—

Court: I sustain the objection.

Mr. Brahm: I don't have any other [T:27] questions.

Court: All right. You can step outside.

Mr. West: Mr. Gross.

WILLIAM C. GROSS, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q Tell us your full name, please.

A William C. Gross.

Q By whom are you employed?

A Chesapeake and Ohio Railway Company.

Q Your position?

A General Foreman in the Mechanical Department.

Q As such, is Mr. Layne underneath you?

A Yes sir.

[T:28]Q And would Mr. McGlone have been under him?

A Yes sir.

Q What was Mr. McGlone's job in the area of February 1, 1983?

A He was employed as a laborer in the Mechanical Department.

Q What is the primary job of a—

Court: Employed by whom, sir?

A Chesapeake and Ohio Railway Company.

By Mr. West:

Q What is the primary job of a laborer in the Mechanical Department of C & 0 in Newport News?

A To clean up trash coal as we call it, coal spillage off the belts, and so forth, from loading coal.

Q Do you have some estimate of the percentage of time that a laborer in the Mechanical Department of C & 0 at Newport News, such as Mr. McGlone, would have spent in cleaning up spilled or trash coal?

A Yes sir, well in excess of fifty per cent of his time.

Q Were you present when Mr. [T:29] McGlone was injured February 1, 1983?

A No, I was not.

Court: You keep any records what per cent of time he works during that against other time?

A No sir.

Court: Mr. McGlone, specificially, you got any records of what time he does that and what time he does his other duties?

A No sir.

Court: You're speculating as fifty per cent, well over fifty per cent, are you?

A Well, the laborer's job—

Court: Talking about Mr. McGlone.

A I'm speaking of the laborer in general.

Court: I want to know about Mr. McGlone.

A He was employed as a laborer to clean up trash coal.

Court: Do you have any records or any knowledge of how much time he spent—

A No sir.

By Mr. West:

[T:30]Q You have such records on any laborer?

A No sir.

Q Are you aware of the place that Mr. McGlone was when he was injured?

A Yes sir.

Q Do you know the distance from that place to the edge of the water of the James River?

A Approximately three hundred feet.

Q And what is—between where Mr. McGlone was injured and the edge of the water of the James River?

A Well, it's the dumper and the main belt drive for the belts, and the belt structure.

Q What is the—what happens from the time that the coal cars are turned upside down at the dumper, and dropped by gravity, until that coal gets aboard a ship or barge?

A When the cars are turned over on the dumper, the coal free falls into a hopper, it's fed by feeder belts onto the main belt. The main belt takes it out the pier from under the dumper, up the incline to the tower, where it's dumped onto the shuttle belt. From there the shuttle belt is able to carry the coal from either side to [T:31] either side of the pier, north or south side. From there it's dumped onto the boom belt and off the boom belt down through the chute into the hold of the ship.

Q From the dumper to the pier, is that a straight line?

A Yes sir.

Q Is the movement of the coal from the dumper to the tower and then onto the ship one continuous movement while loading is going on?

A Yes.

Q Now, what happens if the spilled coal or the trash coal is not removed?

A Well, good possibility if it gets bad enough, it can cause damage to the equipment; therefore, it can be—could be a major catastrophe, and cut you down where you can't operate at all.

Court: What happens to the coal that's spilled? Is that used again?

A It's cleaned up, picked up and stored, and put back in cars. I don't know how it's disposed of or where it goes once it's put back in cars.

Court: Not thrown away as trash?

A Trash coal is an expression.

Court: I'm talking about the [T:32] coal itself, it's used somewhere again?

A Yes.

Court: Have you ever done this kind of work yourself?

A No sir, not primarily employed for it, no.

Court: You have never done it either. Have you ever done cleaning?

A I've used a shovel and a pick, and so forth, but it's not my primary job.

By Mr. West:

Q Do laborers in the Mechanical Department of the C & 0 at Newport News go aboard ships?

A They have done it.

Q For what purpose?

Court: How about Mr. McGlone?

A I couldn't tell you anything specifically about Mr. McGlone. Whether he has been aboard a ship or not.

Mr. Brahm: I'm going to go ahead and object to any question—

Court: I object to what laborers, some laborers do, because—I sustain the objection to that. It's what Mr. McGlone's duties were.

By Mr. West:

[T:33]Q You're not aware of whether he ever did go aboard a ship?

A I have no personal knowledge of it, no sir.

Q Have you ever been aboard a ship with a laborer by the name of John Fox to clean up coal?

Mr. Brahm: I object to that.

Court: Sustain the objection.

Mr. West: I understand Mr. Fox is going to be a witness.

Court: It's what this man's duties are.

Mr. Brahm: I may not call him as a witness.

Mr. West: Then it is irrelevant.

Court: I sustain the objection. It's regarding this particular man's duties.

Mr. West: We except to that. I don't agree it's limited to just what this specific man did.

Court: I overrule your objection. it is what this man was doing and what he was doing that is important here.

Mr. West: As long as I have [T:34] my exception.

Court: All right.

By Mr. West:

Q Other than when he might be—Mr. McGlone might be specifically assigned to clean an office, empty trash cans, what did he do?

A If the pier wasn't operating, he had the towers to clean up; he had the trunnion rollers to take care of and the spilled coal on the walkways on the dumper.

Q Where are the towers located?

A Offshore.

Q On the pier?

A On the pier.

Mr. West: Answer Mr. Brahm.

CROSS EXAMINATION

By Mr. Brahm:

Q In addition to cleaning the spilled coal, Mr. McGlone would also be required to clean offices out, would he not?

A Occasionally.

Q In addition to cleaning offices out, wouldn't he be required to clean out portions of the [T:35] shop and the locker rooms?

A Occasionally.

Q Isn't it true he would also be required to clean out the restroom of the office spaces that he would be working in or other people would be working in?

A Not the office, but the locker rooms, probably.

Q Now, at the time of this accident, February 1, 19—1983, did the Chessie System have certain safety rules that were in force?

A Yes.

Q I show you a copy of the safety rules here, and I'd like to ask you if you would read Rule 196.

Court: Hasn't that—

Mr. Brahm: That was the other—that wasn't introduced either.

Mr. West: My same objection to the relevancy.

Court: All being proffered, so I overrule your objection. Go ahead.

A Rule 196 states, "Before performing any work on conveyor belts or rollers or stepping on or across belts, employees must take necessary precautions [T:36] to assure that such equipment is stopped and that movement is not resumed until work has been completed and all employees are in the clear."

By Mr. Brahm:

Q Was this safety rule in effect at the time of this accident?

A Yes sir.

Q What is the reason for having the belts stopped before any employees work underneath it?

A For safety sake.

Mr. Brahm: Judge, we'd like to offer this as Plaintiff's Number One.

Court: Received over his objection as Plaintiff's Exhibit One.

(At this time, the document was received and marked as Plaintiff's Exhibit Number One.)

By Mr. Brahm:

Q Now, if the belts were not running, then the barge or the ship that was being loaded couldn't be loaded, is that true?

A That's true for that particular side, yes.

Q So if the belts were stopped, in accordance with the safety rules, then the ship wouldn't [T:37] be loaded?

A Not for that period of time.

Q Now, how long did Mr. McGlone work for you, sir?

A I don't have any record of that. I don't know what his employment dates were.

Q Mr. Layne testified he worked approximately four months for Mr. Layne. Would that refresh your recollection, or would that give you some idea how much time he worked for you?

A Well—

Q Mr. Layne worked for you?

A For the same period of time, for that same period of time, it would still—

Court: You say you don't know. I don't think you can ask him what somebody else said.

Mr. Brahm: The only reason I did that, I thought since Mr. Layne worked for Mr. Hamilton or Mr. Gross, that perhaps he could probably—but if you don't know of your own free knowledge—that's all the questions I have.

Court: Anything further?

Mr. West: Nothing further.

Court: You're excused, sir.

Mr. West: That concludes the [T:38] C & O proffer of evidence.

* * *

[T:67] WILLIAM C. McGLONE, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Brahm:

Q Mr. McGlone, will you please state your address, for the record?

A 1035 - 41st Street, Newport News, Virginia.

[T:68]Court: What's your name?

A William C. McGlone.

By Mr. Brahm:

Q Mr. McGlone, on February 1, 1983, by whom were you employed?

A C & O Railroad.

Q I see. And what were you doing, what kind of job did you have with the C & 0 Railway?

A Laborer. Janitorial work.

Q When did you begin working for the C & 0 Railroad, sir?

A '70.

Q Would you briefly tell the Court what type of jobs you had from 1970?

Court: What were you doing on this particular day you were hurt?

A I was on Pier Fifteen side, was cleaning up. Like they have Pier Fifteen, they shut down, they clean up the motor room and the big room in there. You got to sweep the floor and get the paper over on that side.

And Mr. Layne called me on the radio to meet him on the dumper over on Pier Fourteen. And he asked me when I got over there, he asked me would I clean out the belt over there, number three belt. And I told him, I said, I asked him to shut it down, which I asked him that [T:69] on the radio, and—

Court: You went over to clean it out. What were you supposed to clean out on the belt?

A The coal spilling.

Court: Falling off the belt?

A The belt was torn, three or four inches torn off, and it was falling down underneath that.

Court: Was that a job you generally did?

A No sir.

Court: What was your work totally, what do you do from day to day?

A From day to day, we clean up most bathrooms, bunkhouse, they didn't—even need us at Pier Fourteen. They would come and get us to send us to the—just to the bunkhouse, making up beds, clean up the caboose, engine and things like that.

By Mr. Brahm:

Q During that period of time, was there a lot of coal loading on ships?

A I don't know. I think they was loading, I don't know for sure what they were loading out there. They had a lot of work coming in and out at that period of time.

[T:70]Q Mr. McGlone, were you ever required, as part of your duties to go aboard a ship?

A No, never have.

Q Where you ever required, as part of your duties, to load any coal aboard any ships?

A No

Court: You ever load coal on the belts?

A No sir.

By Mr. Brahm:

Q What would you do with this spilled coal that would fall down between the belts?

A Well, that wasn't my job. It come under transportation. They would clean it up.

Q So your job would only be to blow the coal out?

A Well, no, it wouldn't. He just insisted me come over there and blow it out. If they do that, it mostly would be shut down, they would come up and get us. We working one side, and they put us on the other side to clean up over there sometime.

Court: How often did you do that?

A Often as they come and get us.

Court: How often was that, [T:71] every day, every other day?

A Sometimes practically every other day or every day sometimes.

By Mr. Brahm:

Q Mr. McGlone, how long did you work for the Mechanical Department just before this accident?

A From '76, the twelfth month and the ninth day of '76.

Q How long did you work for Mr. Layne?

A Well, I was working underneath him off and on from '76 on, until the accident. We have different shifts. I would be under him every time since I have been there.

Q Mr. McGlone, have you ever been injured while you worked for the railroad before?

A Yes, I have.

Q How many times, sir?

A I guess about four times, if I am not mistaken, I believe four times.

Q Do you recall an injury that you had in July of 1982?

A Yes, on that same belt.

Q Where was that injury, sir? Was that on the land or over the water?

[T:72]A On land.

Q Was it closer to ~~the~~ water than where you were injured this time?

A It was closer, yes, than where I was at that time.

Mr. Brahm: Can I look at Plaintiff's Exhibit Number Two, Judge? I think it's a photograph.

By Mr. Brahm:

Q I'll show you what has been previously admitted as Plaintiff's Exhibit Number Two, and ask you if you can identify the photograph, first, and if you can show us where you were injured in July of 1982.

Why don't you stand up and point it out to the Judge.

A Right in here on the outside of this dumper, right down in here underneath where part of this is at (indicating).

Court: Put an "X" where you say it was.

(At this time, the witness complied with the request of the Court.)

A Somewhere in here (indicating).

Court: Write down hard on it [T:73] with an "X." Right there (indicating)?

A Yes.

By Mr. Brahm:

Q What were you doing at the time of this injury?

A We was washing the belt, the coal out from underneath the belt with high pressure hose.

Q All right. And was the belts on or were they off?

A No, they was shut down. They was working the other side. They always shut down.

Q Were you ever offered any longshoremen benefits for this injury?

Mr. West: I object to the question and the line of questioning unless there's some authority for an estoppel.

Court: Let me ask you one thing here. Were you injured at that time?

A Yes sir.

Court: Did you receive any compensation for your injuries?

A No sir.

Court: From any source?

A No.

Mr. West: That's the subject of [T:74] my objection. Unless there's some estoppel theory.

Court: I think—

Mr. Brahm: The railroad cannot have it both ways.

Court: I think it certainly can.

Mr. West: We can.

Court: I overrule your objection.

By Mr. Brahm:

Q Mr. McGlone, did you settle that claim with the railroad company?

A Yes.

Mr. West: My objection relates to all this.

Court: Overrule your objection. It is relevant, what type of work he was considered by the railroad and by him.

By Mr. Brahm:

Q Can you—

Mr. West: In 1982?

Court: I understand that.

Mr. Brahm: The act they claim coverage under was enacted in 1972.

Court: I understand.

[T:75] By Mr. Brahm:

Q Can you identify that, sir?

A Yes sir.

Q What is that, sir?

A This was the thing where I signed to settle the claim when I got hurt in '82.

Q What did the Claim Agent tell you, what law did he say it was under?

A FELA.

Mr. Brahm: We'd like to have this admitted as Plaintiff's Exhibit Four.

(At this time, the document was received and marked as Plaintiff's Exhibit Number Four.)

Mr. West: Note our objection.

Court: All right, sir.

By Mr. Brahm:

Q Mr. McGlone, are you familiar with the contract that exists between your labor union and the railway company?

A Yes.

Q Do you know of any provision in that contract that provides for compensation under the Longshoremen Act?

[T:76]A No sir.

Q Now, Mr. McGlone, prior to this injury in 1983, which is the subject matter of this litigation, if you were injured, wherever you were injured, what law or what act did you expect to be covered under?

Mr. West: I object.

Court: I sustain the objection. What he expected is not relevant.

Mr. Brahm: I withdraw the question.

Mr. McGlone—Judge, may I have Plaintiff's Exhibit Number Three, I believe it is. The notice.

(At this time, the exhibited [sic] was handed to Mr. Brahm.)

By Mr. Brahm:

Q Mr. McGlone, in the course of your employment with the railway company, are you required to look at bulletin boards for notices?

A Yes—bulletin notices on the bulletin board, you have to go there, because they put up different jobs, you check that every day.

Q And is this—on the C & 0 pier facility?

A Yes.

[T:77]Q I ask you if you will look over Plaintiff's Exhibit Number Three and see if you can identify that as being posted in your—

Court: Have you ever seen a notice like that?

A No sir, never have.

By Mr. Brahm:

Q Now, Mr. McGlone, were the belts moving, or were they shut down at the time you were injured?

A They was moving.

Q Would you tell the Judge what you did just before you were injured?

Court: Now, we're getting into the facts of this.

Mr. Brahm: I think it's important, Judge, because of the fact that he—he requested the belts be shut down.

Court: I understand that, but that's not—we got somewhere the FELA stuff, the Longshoremen's and Harborworkers' Act starts, and somewhere, it's maybe here or there, and that's the factual situation I believe I have to determine, but how he actually got injured doesn't make any difference.

The idea was what I think is [T:78] relevant, whether he was loading or not unloading, exactly what he was doing, which he told you he was doing. But—somewhere there has got to be a line where one act stops and the other one starts. And that's what I believe I have to determine here.

By Mr. Brahm:

Q Mr. McGlone, have you ever accepted any benefits, compensation benefits under the Longshoremen Act?

A No sir. I didn't know anything about it, because at the time I was in the hospital, and when I come home out of the hospital I had checks there at the house. And I knew I wasn't supposed to be getting under. He explained it to me, it comes under the maritime. And I knew I wasn't supposed to come under that, and I called you.

Q Did you send those checks back?

A Yes.

Q Are you receiving any benefits right now, sir?

A Yes.

Q From where?

A Railroad Retirement Board.

Q Mr. McGlone, did Mr. Layne tell you at the time of your injury that it was important [T:79] for you to clean out under the belts while they were running because the barge was being loaded?

A Yes. He insisted that I should clean out from underneath the belt at the time it was running.

Q Have you ever been a member of the International Longshoremen's Association?

A No sir.

Mr. Brahm: That's all the questions I have.

CROSS EXAMINATION

By Mr. West:

Q Mr. McGlone, you referred before to your agreement. That's the agreement between your union and the railroad that you're talking about?

A Yes, the Boilermakers, Oilers.

Q And you said there was nothing in there that said that you would be covered under the Longshoremen's and Harborworkers' Compensation Act?

A No, not as I know of.

Q Is there anything in there that says you won't be covered under the Longshoremen's and Harborworkers' Compensation Act?

[T:80]A Well, the way they explained it to us—

Q What I'm asking, you said—

Mr. Brahm: He's trying to explain it.

Mr. West: This is what somebody told him.

By Mr. West:

Q You read the contract; is there anything in it?

A No, it's not.

Mr. West: That's all I have.

Court: All right. Step outside, sir.

Mr. West: If I might make a point here. I think Mr. Brahm will agree with it. If the Court got the impression we are claiming the man comes under the act but are not paying him compensation, this is pursuant to an agreement between the C & 0 and your firm. We wouldn't just continue every two weeks sending him a check and having it returned.

Court: Certainly not relevant for this, what we're doing here now.

• • •

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

AT LAW NO. ______

WILLIAM C. MCGLONE,
Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant.

SERVE:

Aubrey R. Bowles, III, Esquire
Registered Agent
Chesapeake & Ohio Railway Company
901 Mutual Building
Richmond, Virginia 23219

REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff, by counsel, pursuant to the Rules of Court, requests that the defendant respond within twenty-eight (28) days after service, at the offices of Moody, Strople, Brahm & Lawrence, Ltd., 201 J. J. Henry Building, County and Court Streets, Portsmouth, Virginia, produce or make available for copying, or furnish the originals or copies of the following, or permit the plaintiff to have copies made at his expense, the following items:

1. Produce ship docking and ship departure reports for pier 14 for February 1, 1983.

2. Produce all documents the defendant intends to rely upon at trial or hearing in this matter.

3. Produce all Release of Claims forms executed by the plaintiff within the last ten (10) years.

4. Produce all Railroad Retirement Sickness Benefits Apportionment forms executed by the plaintiff within the last ten (10) years.

5. Produce all Notices of Compensation used by the defendant within the last ten (10) years at its Newport News yard.

6. Produce the plaintiff's entire personnel file.

7. Produce the plaintiff's entire medical file.

8. Copies of the lists of Railway personnel working at the Newport News Barney yard and Pier 14 on February 1, 1983.

WILLIAM C. MCGLONE

By /s/ Russell N. Brahm, III
Of Counsel

Russell N. Brahm, III
Willard J. Moody
Moody, Strople, Brahm
& Lawrence, Ltd.
Post Office Box 1138
Portsmouth, Virginia 23704-1138

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH

LAW NO. L-83-327

WILLIAM C. MCGLONE,
Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant.

RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS

The defendant herewith responds to the plaintiff's Request For Production Of Documents and says:

1. Produced herewith to the plaintiff.

2. Any or all documents previously or subsequently furnished by way of Answer To Interrogatories by the defendant or in response to this or subsequent Request.

3. Produced herewith to the plaintiff.

4. Produced herewith to the plaintiff.

5. Produced herewith to the plaintiff.

6. Produced herewith to the plaintiff.

7. Produced herewith to the plaintiff.

8. See defendant's Answer to Interrogatory No. 3, previously filed herein.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY

By /s/ Richard Wright West
Of Counsel

Richard Wright West, Esquire
WEST, STEIN, WEST & SMITH, P.C.
P. 0. Box 257
Newport News, VA 23607
Counsel for Defendant

THE CHESAPEAKE & OHIO RAILWAY COMPANY

SETTLEMENT AND FINAL RELEASE OF ALL CLAIMS
Read Carefully Before Signing

The undersigned acknowledges the receipt of Two Thousand & 00/100 Dollars ($2,000.00) from THE CHESAPEAKE & OHIO RAILWAY in full settlement and satisfaction of all claims, demands, and causes of action hereinafter mentioned, and in consideration of said payment hereby RELEASES and forever discharges THE CHESAPEAKE & OHIO RAILWAY COMPANY, its agents, servants and employees ____________________ from all claims, demands, and causes of action which the undersigned has or might have against them or any of them arising out of or in any way connected with personal injuries received at or near Newport News, Virginia, on or about July 9, 1982. This settlement is made upon my representation that I have not received any supplemental sickness benefit payments because of this accident and if I do receive any hereafter because of this accident, I agree to reimburse said Railroad Company the amount so received.

Both the undersigned and the Company do now acknowledge that the injuries which the undersigned sustained may be permanent and progressive; that recovery may be uncertain and indefinite and that injuries, damages and losses may not now be fully known and may be more numerous and more serious than now believed. In making this SETTLEMENT AND FINAL RELEASE the undersigned relies wholly upon his or her own judgment and has not been influenced to any extent whatever by any representation or statement of the claim agent, doctors, or other representatives of the Company. The undersigned admits that no promise or agreement has been made to him or her, and that this RELEASE contains the entire agreement between the parties hereto and that all the

terms of this RELEASE are important parts of this contract and are binding upon all parties.

The word "injuries", where used in this SETTLEMENT AND FINAL RELEASE, include all injuries which are unknown as well as injuries which are known and includes all consequences of such injuries which may hereafter develop as well as consequences now developed. This settlement is intended to be final, the undersigned taking his or her chances that the injuries may prove to be more serious than now believed and the other parties taking their chances that the injuries may prove to be less serious than now believed.

It is further understood and agreed that this is a settlement by compromise of a disputed claim and that the payment made is not to be construed as an admission of liability, all liability being expressly denied.

I have read and understand this release W.C. Mc.

SIGNED and SEALED at N.N.VA., on this 6 day of AUG, 1982

Witnesses Sign Here /s/ William C. McGlone

/s/ W.B. Swain
/s/ F.L. Royall

Newport News, Virginia, August 6, 1982

The Chesapeake and Ohio Railway Company having agreed to pay the sum of xx Two Thousand & 00/100 xx Dollars in settlement of my claim for personal injuries received at or near Newport News, Virginia on or about July 9, 1982, I hereby request said Railway Company to apportion the entire amount to be paid in said settlement to factors other than time lost. It is understood that this request is made and this consent given for the sole purpose of complying with the requirements of the Railroad Retirement Act, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act, and is not to be so construed as to impair or limit the effect of the personal injury settlement above mentioned or of the general release which I am to execute in consideration of said settlement.

This settlement is subject to lien of the Railroad Retirement Board in the amount of No lien.

/s/ William C. McGlone
Railroad Identification No. 2612047

Witnesses: /s/ W.B. Savain
/s/ F.L. Royall

The apportionment above requested is hereby made.

Executed at Richmond, Virginia on this 6th day of August, 1982.

The Chesapeake and Ohio Railway Company
By: /s/ F.R. Royall

Rev. 8-71

Invoice No. I 47392

ACCIDENT/INCIDENT REPORT
THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER
   INN-0195
2. AUTHORIZATION DATE
   7/20/82
3. LAST NAME, FIRST NAME, MIDDLE INITIAL
   McGlone, William C.
4. IDENTIFICATION NUMBER
   2612047
5. SOCIAL SECURITY NUMBER
   226-40-8431
6. ADDRESS - NUMBER AND STREET - CITY AND STATE - ZIP CODE
   732 - 34th St., Newport News, Va. 23607
7. OCCUPATION
   Laborer
8. SEX
   Male
9. DATE OF BIRTH
   8/31/34
10. AUTHORIZING OFFICER
    W.C. Gross, Gen.Foreman-Piers
11. RESP. CODE
    2024
12. OFFICER'S TELEPHONE
    (804) 380-5080

THIS IS FIRST REPORT

FINAL REPORT

13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ONSET OF ILLNESS)
    Patient states that he fell on a conveyor belt, sustaining injury to his back and right hip

14. DATE OF INJURY OR ILLNESS
    7/9/82

15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS, OTHER STUDIES, OPERATING NOTES, DISCHARGE SUMMARIES, ETC.)

Re: William McGlone #5697 July 22, 1982

Mr. McGlone is in the office today and he apparently sustained an injury to his right side on July 9, 1982, when he fell against some equipment at his job, resulting in an injury to the mid-portion of his right thigh and the hip area. X-rays were not performed at the time of the injury. He was seen in the ER and evaluated for these injuries. He is seeking an orthopaedic evaluation for an opinion as to the nature of these injuries.

On examination, he does have signs of an injury that is healing on the lateral aspect of his thigh, this does not appear to be serious, but there is some swelling and soreness around this area. We advised him that this should be treated simply with cleansing the area and allowing it to heal over from the sides. He also, has some soreness over the right iliac crest. X-rays taken indicate no evidence of any fractures, but there is tenderness to palpation. Moist soaks, and moderation of activity are advised as a form of treatment. This basically is the extent of his injuries; the diagnosis is abrasion of the right thigh, and a contusion of the right iliac crest. ADG/msd

16. DIAGNOSIS
    See #15 above.

17. TREATMENT GIVEN PRESCRIBED (SPECIFY)
    See #15 above.

18. FURTHER TREATMENT INDICATED?
    NO

19. MEDICATION GIVEN PRESCRIBED?–
    NO

20. PATIENT HOSPITALIZED?
    NO

21. PATIENT TREATED BY ANYONE ELSE?–
    NO

22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS FOLLOWS)
    ABLE TO RETURN TO DUTY-NO RESTRICTIONS-ON 7/26/82 DATE

23 .ADDITIONAL COMMENTS SPECIFIC RECOMMENDATIONS OF TREATING PHYSICIAN
    See #15 above.

24. TREATING PHYSICIAN SIGNATURE
    /s/ A. Greene, M.D.

25. DATE
    7/26/82

27. TREATING PHYSICIANS NAME (IF DIFFERENT FROM PAYEE)
    Arthur D. Greene, M.D.

28. ADDRESS - NUMBER AND STREET
    2019 Cunningham Dr.

29. CITY AND STATE
    Hampton, VA 23666

30. DATE	ITEMIZED SERVICE SUPPLIES	AMOUNT
7/22/82	initial visit	40.00
7/22/82	x-ray rt pelvis	35.00

31. TOTAL FEE
$75.00

RECEIVED
CHESSIE SYSTEM

AUG 2 1982

Casualty Prevention Department
BALTIMORE MARYLAND

Invoice No. I 47375

ACCIDENT/INCIDENT REPORT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER
INN-0195

2. AUTHORIZATION DATE
7/13/82

3. LAST NAME, FIRST NAME, MIDDLE INITIAL
McGlone, William C.

4. IDENTIFICATION NUMBER
2612047

5. SOCIAL SECURITY NUMBER
226-40-8431

6. ADDRESS - NUMBER AND STREET - CITY AND STATE - ZIP CODE
732 - 34th St., Newport News, Va. 23607

7. OCCUPATION
Laborer

8. SEX
Male

9. DATE OF BIRTH
8/31/34

10. AUTHORIZING OFFICER
W.C. Gross, Gen.Foreman-Piers

11. RESP. CODE
2024

12. OFFICER'S TELEPHONE
(804) 380-5080

THIS IS FIRST REPORT

13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ONSET OF ILLNESS)
    Foot slipped while washing under coal loading belt and fell against metal beam hurting rt. thigh.

14. DATE OF INJURY OR ILLNESS
    7/9/82

15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS OTHER STUDIES OPERATING NOTES DISCHARGE SUMMARIES ETC.)
    Healing abrasion and contusion of right thigh. Strain of right lower lumbar muscles.

16. DIAGNOSIS
    Abrasion and contusion of thigh & back pain.

17. TREATMENT GIVEN PRESCRIBED (SPECIFY)
    Rest, heat, fomax tablets for pain, Soaks & Neosporin Ointment to abrasion.

18. FURTHER TREATMENT INDICATED? - DESCRIBE
YES - as above

19. MEDICATION GIVEN PRESCRIBED? - DESCRIBE
    YES - Fomax

20. PATIENT HOSPITALIZED?
    NO

21. PATIENT TREATED BY ANYONE ELSE?—
    YES - ER at Riverside Hospital

22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS FOLLOWS)
    UNABLE TO RETURN TO DUTY - ANTICIPATED LOSS OF TIME 10 DAYS
    ADDITIONAL INSTRUCTIONS - FOLLOW UP APPOINTMENT: ABOUT 7/20/82

24. TREATING PHYSICIAN SIGNATURE
    /s/ Hugh Givens, Jr. MD

25. DATE
    7/13/82

RECEIVED
CHESSIE SYSTEM

AUG 2 1982

Casualty Prevention Department
BALTIMORE MARYLAND

Invoice No. I 47393

ACCIDENT/INCIDENT REPORT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER
INN-0195

2. AUTHORIZATION DATE
7/20/82

3. LAST NAME, FIRST NAME, MIDDLE INITIAL
McGlone, William C.

4. IDENTIFICATION NUMBER
2612047

5. SOCIAL SECURITY NUMBER
226-40-8431

6. ADDRESS - NUMBER AND STREET - CITY AND STATE - ZIP CODE
732 - 34th St., Newport News, Va. 23607

7. OCCUPATION
Laborer

8. SEX
Male

9. DATE OF BIRTH
8/31/34

10. AUTHORIZING OFFICER
W.C. Gross, Gen. Foreman

11. RESP. CODE
2024

12. OFFICER'S TELEPHONE
(804) 380-5080

THIS IS FIRST REPORT

FINAL REPORT

13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ONSET OF ILLNESS)
See 1st report.

14. DATE OF INJURY OR ILLNESS
7/9/82

15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS OTHER STUDIES OPERATING NOTES DISCHARGE SUMMARIES ETC.)
Much improved. Laceration on thigh healing. Twinge of pain in right lower back with certain movements.

16. DIAGNOSIS
Contusion of thigh with laceration and low back strain.

17. TREATMENT GIVEN PRESCRIBED (SPECIFY)
Cont. same.

18. FURTHER TREATMENT INDICATED?-DESCRIBE
YES - Rest, Zomax, soak & Neosporin of ointment

19. MEDICATION GIVEN PRESCRIBED?—DESCRIBE
YES - Zomax

20. PATIENT HOSPITALIZED?
NO

21. PATIENT TREATED BY ANYONE ELSE?
YES - ER at Riverside

22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS FOLLOWS)
ABLE TO RETURN TO DUTY-NO RESTRICTIONS-ON 7/26/82 DATE

23 .ADDITIONAL COMMENTS SPECIFIC RECOMMENDATIONS OF TREATING PHYSICIAN
To work 7/26/82.

24. TREATING PHYSICIAN SIGNATURE
/s/ Hugh Givens, Jr.

25. DATE

RECEIVED
CHESSIE SYSTEM

AUG 2 1982

Casualty Prevention Department
BALTIMORE MARYLAND

Invoice No. I 47309

ACCIDENT/INCIDENT REPORT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER
   INN-0195
2. AUTHORIZATION DATE
   7/09/82
3. LAST NAME, FIRST NAME, MIDDLE INITIAL
   McGlone, William C.
4. IDENTIFICATION NUMBER
   2612047
5. SOCIAL SECURITY NUMBER
   226-40-8431
6. ADDRESS - NUMBER AND STREET - CITY AND STATE - ZIP CODE
   732 - 34th St., Newport News, Va. 23607
7. OCCUPATION
   Laborer
8. SEX
   Male
9. DATE OF BIRTH
   8/31/34
10. AUTHORIZING OFFICER
    W.C. Gross, Gen.Foreman-Piers
11. RESP. CODE
    2024
12. OFFICER'S TELEPHONE
    (804) 380-5080
13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ONSET OF ILLNESS)
    Pt slipped and fell against some steel.

14. DATE OF INJURY OR ILLNESS
7/9/82

15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS OTHER STUDIES OPERATING NOTES DISCHARGE SUMMARIES ETC.)
Abrasion of epidesmis - 3cm x 15cm

16. DIAGNOSIS
Abrasion of epidermis

17. TREATMENT GIVEN PRESCRIBED (SPECIFY)
Can not read.

18. FURTHER TREATMENT INDICATED?
NO

19. MEDICATION GIVEN PRESCRIBED?
NO

20. PATIENT HOSPITALIZED?
NO

21. PATIENT TREATED BY ANYONE ELSE?
NO

22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS FOLLOWS)
ABLE TO RETURN TO DUTY-NO RESTRICTIONS-ON 7/26/82 DATE

23 .ADDITIONAL COMMENTS SPECIFIC RECOMMENDATIONS OF TREATING PHYSICIAN
Can not read.

24. TREATING PHYSICIAN SIGNATURE
/s/ Hugh Givens, Jr. MD

25. DATE
7/9/82

RECEIVED
CHESSIE SYSTEM

JULY 21 1982

Casualty Prevention Department
BALTIMORE MARYLAND

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

LAW DOCKET NO. L86-335

ROBERT T. GOODE, JR.,
Plaintiff,
v.
NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS
Norfolk, Virginia
September 19, 1986

Before:
HONORABLE CHARLES R. WATERS, II, JUDGE

* * *

[T:12]HERBERT R. CROWDER, called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

JOHN Y. RICHARDSON, JR., appearing for defendant.

By Mr. Richardson:

Q Mr. Crowder, state your name, please.

A Herbert R. Crowder.

Q And where do you reside, Mr. Crowder?

A 505 Bonsack Court, Chesapeake.

The Court: Would you spell your last name?

The Witness: C-r-o-w-d-e-r.

By Mr. Richardson:

Q And where you are employed?

A Norfolk Southern Corporation.

Q Your job?

A Master mechanic.

Q Can you tell the Court briefly your career with the railroad, when you came and the ranks you came up through?

A It [sic] was hired in 1956 in Roanoke, Virginia, as a machinist's helper. I went from machinist's helper to machinist's helper apprentice. I was then furloughed, went to the car department as a labor foreman. From there to Williamson, West Virginia, as a gang foreman. Back to [T:13] Roanoke, Virginia, as gang foreman. Promoted to assistant car foreman in Roanoke. Back to Williamson, West Virginia, as a car foreman, St. Louis, Missouri, as a general foreman, Bellevue, Ohio, as general foreman, Moberly, Missouri, as assistant master mechanic.

Back to Roanoke, Virginia, as a mechanical supervisor in charge of personnel, to Decatur, Illinois, as master mechanic, and now master mechanic in Norfolk.

The Court: It would take a brilliant witness just to remember all that.

By Mr. Richardson:

Q Mr. Crowder, how long have you been at Norfolk?

A I've been at Norfolk since 1979.

Q You have been a master mechanic all that time?

A No, sir. About four and a half years.

Q As master mechanic, what department are you responsible for?

A I have responsibility for the mechanical department which covers the car shop repairing freight cars, locomotive shop servicing and repairing locomotives, and the coal pier operation as far as the mechanical department is concerning being here in Norfolk. I also have facilities at Crewe, Virginia, and at Richmond, Virginia, and have jurisdiction over the areas from Norfolk to but not including Lynchburg.

[T:14]Q All right. Is Mr. Goode, the plaintiff, in your department?

A Yes, sir, he sure is.

Q As well as Mr. Jones and Mr. Bates standing outside?

A Yes, sir, they are.

Q Are you familiar with the term motive power department?

A Yes, sir.

Q Is that the same thing as the mechanical department, would you describe it?

A The motive power department is I won't say a misnomer. It's a term that's been attached locally to almost exclusively the pier department, if you may. It is all mechanical department but that—when we use the terminology here, we are normally talking about the pier group.

Q Okay. Do you know Mr. Goode's title?

A Yes, sir.

Q And what is that?

A He's a machinist.

Q And is he assigned to a particular group within your department?

A Yes, sir, he is.

Q What department is that? Is that the pier department you were describing?

[T:15]A The pier department, yes.

Q Does that also go by the motive power pier department?

A That's correct.

Q How long has he worked in this department, Mr. Crowder?

A I believe, recollection, about 1979 the most recent. He was employed once before, but I don't recall those dates.

Q Okay. Is it your understanding he came back after being employed outside the railroad in 1979?

A Yes. All I know is he was employed before and came back. I wasn't sure what the circumstances were.

Q What did he come back as? If you know. If Mr. Bates knows—

A I'm not sure. I don't know. I'll leave it that way.

Q Other than the machinists that are assigned to the motive power pier department, what other crafts or jobs are assigned to the motive power pier department?

A We have electrical workers, both electricians and helpers. The electrical helpers cover somewhat of a wide scope. They attend the lines for tying ships up and allowing them to leave. They also operate some of the equipment. They work as helpers not only for electricians but for other [T:16] crafts as needed.

We have pipe fitters, we have not as shop craft but we also have laborers that are under our jurisdiction.

Q You have described, I think, what the operators do within the electrical craft; is that correct?

A That's correct.

Q What do the pipe fitters do?

A Prepare and renew lubricating lines, air lines, water lines, oil lines.

Q What do the electricians who are not operators do?

A The electricians, of course, look after all our motors, circuit breakers, power contractors, programmable controllers, electrical switches.

Q Are any trainmen or members of UTU assigned to the motive power pier department?

A No, sir, they are not.

Q Are any trainmen allowed to perform any of these repairs or to operate any of the equipment that's within the motor power pier department?

A No, they are not allowed to repair anything or operate the equipment.

Q Are they allowed on piers?

A Can I rephrase that?

Q Yes, sure.

[T:17]A There is one piece of equipment that the trainman would operate. We have winches where we winch cars if they stall on the dumper. In the same connection, we have what is known as a rabbit. It's a mechanical feature that has an arm on it that will come up underneath the car and grab the car by the axle, if you may, and move it. It's a matter, on the rabbit, of pushing a button. The rope [sic] or the winch is something that can be operated by a brakeman.

Q We may get to that when we are describing the operation.

The matter that we have had marked as Exhibit—Court Exhibit A, have you reviewed that this morning?

A Yes, sir, I have.

Q And are the facts that are related in here essentially correct?

A Essentially, to the best of my knowledge.

Q Any correction you would like to make?

A The only thing that I saw that maybe could be misconstrued was that machinists repair freight cars. That's yes and no. There are times in emergency conditions where they will take a burning torch and trim a car if it's too wide for the dumper. And that's all that's ever has to be done to it. It's ready for service after that. So that could be construed as repaired, but they don't normally, as such, repair car equipment.

[T:18]Q Okay. There was also, I think you discussed with me, whether the 35 number of machinists was correct.

A That's correct. I believe the exact figure was 29 machinists, which did not include gang leaders, and all of those are not assigned to the coal pier operation as such.

Q Okay. Of the 29 machinists, how many are assigned to the coal pier in the Norfolk terminal?

A 16, I believe it was.

Q Okay. So the difference between the 35 number I put in here and the 29 is the gang foremen?

A Gang leaders.

Q Okay. All right.

Mr. Richardson: If this could be admitted into evidence now, I would certainly offer it.

The Court: Well, now—

Mr. Richardson: I am just trying to save having to ask him all those questions. I am going to elaborate on the critical ones. I think that Mr. Wilson, maybe at the conclusion of his testimony if I re-cover it, you may not have any—

The Court: I will admit it into evidence solely as evidence of what this witness would testify to but not for the truth of it.

Mr. Richardson: Okay. That's fine.

EDDIE W. WILSON, appearing for the plaintiff.

Mr. Wilson: All right, sir. To save time, that [T:19] is agreeable. It was my understanding that it was going to be entered simply as a statement of facts with the brief that this witness would corroborate through his testimony. That is the only basis to have its admission at this point.

Mr. Richardson: That's right. To save two hours of time, I am just trying to offer it as opposed to having him recite it on the stand. I think he will recite the areas you are concerned with. If not, I am sure you will bring it out in cross-examination.

Mr. Wilson: The only thing I can say is there are some opinions and conclusions in there which may be Mr. Richardson's as opposed to Mr. Crowder's. I will ask the Court to take note of that when you are reading it.

Mr. Richardson: I'm sure he will.

By Mr. Richardson:

Q .Now, how are machinists—

Mr. Richardson: Excuse me, your Honor. I'll wait until you are ready.

The Court: That's all right. Go ahead.

By Mr. Richardson:

Q Mr. Crowder, how are machinists assigned to the piers as opposed to anywhere else in the Norfolk terminal?

A Machinists, of course, have seniority. There are jobs advertised or railroad talk bids and they bid on their day and their shift predominantly. The third way that [T:20] they bid on jobs is the location. All of the machinists on Norfolk terminal are on the same seniority roster.

If their seniority warrants, they can bid jobs at the coal piers, pier operation, they can bid them for the maintenance gang, which predominantly works at 38th Street car shop, although not necessarily, or they can bid a job at the roundhouse.

Q The roundhouse being?

A Where locomotives are serviced or maintained.

Q Do they move around or generally stay in place as machinists at Norfolk terminal.

A There is some slight movement, but generally speaking you see the same people on about the same jobs.

Q Are the other crafts, the other unions of the railroad, similiarly mobile depending on bidding jobs?

A Yes, sir.

Q What do the machinists do in general? If you would define a machinist, how would you do that?

A In the pier operation or in all?

Q Let's say in all first.

A Okay. Well, first of all, I will try to define the difference between electrical and mechanical. Anything that has much electrical to it would go to the electrical craft or the electrician. When I say much, motors don't come under machinists, although they will at times help put them [T:21] in or take them out.

Gears, for instance, almost never come under an electrician, although there are fringe areas that they could.

So anything that is gear driven, anything that has bearings, generally speaking, these are machinist's jobs. Gears, hydraulic systems, pumps. Hydraulic pumps in most cases are attached to an electric motor but the pump part generally would be machinist.

The changing of wheels and pushers, the changing of wheels and barneys. The barney neck, the barney head, the retarders on the dumpers, the hammer mills on the dumpers, the trunnion wheels and equalizers on the dumpers, the—

Q I think we are moving ahead. What do the machinists assigned to the piers do? What equipment do they work on?

A Well, essentially that's—I guess I'm still thinking about the piers. These are the things that the machinists at the piers will do.

Q Okay. Can you distinguish for the Court what that equipment is that the machinists assigned to the piers work on?

A It's—

Q I know you are going to be repeating yourself, but I'm not sure it's clear.

A The equipment I am talking about at the piers, [T:22] the barney, the pushers, the dumpers, are all equipment that we use in our business to dump coal. A pusher will push the car to the barney. The barney will take it, the car, from where the pusher stops up an incline and put it on a dumper. Of course the dumper will roll over. It dumps the car upside down. It has retarders on it that hold it in that position. As it moves onto the dumper, it will stop it where it has to be stopped for the arms to hold the car down.

Q Mr. Crowder, I have shown you some photographs this morning and they are the photographs I handed to the Court earlier which I think we agreed to. Have you looked at those photographs?

A Yes, sir, I have.

Q Are they accurate portrayals of the area out there at Lambert's Point where we are discussing?

A Yes, sir.

Mr. Richardson: If the Court would allow you, could he step down and show you on these photographs the areas we are talking about? There are the originals.

The Court: Sure.

By Mr. Richardson:

Q Maybe this is the one to start with. Could you describe the equipment you were just referring to with relation to this photograph which I believe is Exhibit—

The Court: It doesn't matter which exhibit it [T:23] is.

By Mr. Richardson:

Q What does the photograph show?

A .It shows the dumper. This is the dumper here. This is the incline I was speaking of. And the barney is not shown here, but the barney pushes the cars up onto the dumper, and of course on the dumper are where the retarders are, or at least there are retarders. There are other retarders involved.

As the barney pushes one or two loads on there, it kicks off two empties. They come out through here, and we are looking at the south. This is the north dumper. This will come down and the car will come out on somewhat of a flat area where we have spoke of a rabbit system. It will pick the car up and kick it down or help motivate it on through some more retarders out to a kickback. Now, this picture does not show you the kickback or the south, but it is essentially the same as the one from the north. It goes down and rolls up this incline, and while it's up the incline you've got a switch that automatically throws so when it comes back in his direction going to the empty yard it goes on down through another series of retarders.

Q Mr. Crowder, it's understood, I think, that Mr. Goode was hurt while he was repairing a retarder. Can you show the Court where that retarder is?

[T:24]A It would be on this dumper, on the south side dumper.

Q Can you tell the physical location with respect to the track?

A Well, the retarders are within the gauge of the track. Is that what the question is?

Q Yes. How does it act on it? What is its purpose?

A Its purpose is to retard and to hold the freight car, the hopper car, once he gets to the dumper. In other words, the car is revolving as it comes on. Where we want it to stop we will apply the retarder to stop it and then hold it until all motion is stopped.

Q Can you show the Court what equipment the motive power department and machinists particularly have responsibility over the maintenance and repair of in this photograph, or would this photograph probably be better?

A This would give a more general view. This—

Q What does this photograph show?

A I'll speak in railroad east or west, if you may, because geographic is just the opposite. But railroad east—

Q Towards the water?

A Towards the water, going this way, this is the thawing shed.

Q The white building?

[T:25]A The white building. This is the south one and the north one.

Q What does the thaw shed do?

A In the winter months, January and February predominantly we electrically heat these buildings which through infrarays thaws the cold from the skin of the car. It doesn't thaw all the way through.

Q How long is a car in those thaw sheds?

A 20 minutes is a good time. There is no time limit.

Q What equipment in that shed are you responsible for?

A We are in charge of the heaters, their installation, maintenance of the heaters, which comes under the electrical craft, and there are two pushers that operate in each of these buildings which come under both the electrical and machinists.

The Court: You are talking about this pier?

The Witness: Here.

By Mr. Richardson:

Q After the car leaves the thawing shed what does it do?

A Then the barney picks it up, and, if I may, this area here is what we are seeing here. The pusher will push it down to about where this picture stops and then the barney [T:26] will bring it up to the dumper. There is a brakeman that is stationed down in this area or right here that will physically cut the two cars in two or one car in two. The mechanism is the on car to do so.

Q Is he a member of your department?

A No, he is not.

Q All this equipment you're talking about, the barney and pushers, is that equipment within the jurisdiction of your department?

A Yes, sir.

Q Okay.

A Again, the barney will pick it up onto the dumper and all of this is semi-automatic but is activated by a man that works under our jurisdiction, my jurisdiction. They are electrical workers but they are helpers and they are referred to in our terminology as operators.

Q What, after the coal is dumped, happens to it?

A After the car is dumped, it goes down into—

Q I'm talking about the coal itself.

A The coal will go down into hoppers, which, in essence, is in this area, which feeds down, and the hoppers are a funnel type that go down to hopper feeder belts which take the coal and put it on A or Al belt. There is two series of belts that treat this whole thing. And it takes it from A belt to B belt to C belt.

[T:27]Q What is this white thing in the upper right-hand corner?

A That's the D belt. D and Dl belts. The coal is dumped here, it goes down and comes crossways. It comes over to what we referred to or is referred to as the BC house. It's just a transfer point where the belt dumps from B belt onto C belt.

Q Is this the transfer house pointed out here?

A That's correct.

Q From where does the coal go from there?

A It does on the C or Cl belt out the length or to the loaders. Not necessarily the belts go the length but the coal will come to the loaders.

Q And from the loaders to the ship?

A From C belt it goes to D belt and E and finally F belt and into the ship.

Q All this equipment you have described, the conveyor system, the shiploaders after the coal is dumped is also within your department's jurisdiction?

A Yes, sir.

Q Are they operated by people in your department?

A Yes, sir.

Q Are they maintained and repaired by people in your department?

A The mechanical and electrical facets of it. The [T:28] structural part comes under the engineering department, which is not under my department.

Q When you say the mechanical, are you talking about just the machines out there?

A The wheels, the electrical motors, the trolley systems, idlers underneath the belt, the pulleys that convey the belts.

Q Okay. Has the plat that has been introduced as Exhibit 1 and the landmarks shown on that and the copies of these pictures, do they point to the landmarks you have been describing, the transfer shed, the dumpers?

A Yes.

Mr. Richardson: Your Honor, I don't want to add—

The Court: I can see it.

Mr. Richardson: Okay. I don't think there is any disput [sic] on those, but I just wanted it clear for the record he attests to what those photographs show.

By Mr. Richardson:

Q Other than the equipment that you have described that being—is it fair to say that the jurisdiction of the motive power pier department shows somewhere around the thaw shed as far as equipment is concerned?

A Yes. That's a fair assumption.

Q How far is the thaw shed, approximately, from the river? How far is the dumpers?

[T:29]A I'm going to say the dumpers are five to six hundred feet and the thaw shed, depending whether you're talking about entrance or exit, six to seven hundred feet. Purely guesstimates now.

Q I understand that. Other than the equipment you have described which your department works on—and I say your department, the motive power pier department—that being the pusher, the barney, the dumpers, the thaw shed, the shiploaders and conveyor belt system—I am sure I have forgotten something—what other equipment does the motive power pier department work on generally, if anything?

A Well, their purpose in being there and their only purpose in being thre is to maintain the coal dumping facility. Now, I guess I'm going to answer your question. A good bit of their work is out on these facilities that I've just gone through, the dumper and the loaders and belt system.

Q If you were to assign a percentage of the time they spent working, how much would they work on this equipment.

A 99 percent, I would hope.

Q They are supposed to work on it 99 percent?

A That's right.

Q Do they occasionally have any opportunity to fix rail cars? I notice you took exception to my term repair rail cars in that factual stipulation. Can you explain what [T:30] they do on occasion?

A The main thing I took exception to was the word "repair." We will have cars that come off the dumper, for instance, that won't roll because the brakes have set up, and the machinist will take a cotter key out, knock a brake pin out, and release the brakes so that it will roll free.

Prior to coming into the thaw shed—not necessarily prior to, sometime it's after, but most of the time prior to coming into the thaw shed we have car inspectors that will signify that a car has a spread side, if you may. The limitation—

Q Too wide?

A That's right. The limitations are greater than will go through the area that it's supposed to, which will require, in some instances, a burning torch, oxygen settling [sic] torch, to trim a portion off. Sometimes this is final; you don't have to do anything else after you trim it. Other times the car is rendered bad order and will go to the car shop.

Q So when to repair cars, to use that term, and I know it's wrong, is to coordinate the car going through the unloading process?

A To facilitate the smooth dumping operation, yes, sir.

Q And that's only done on occasion?

[T:31]A That's right.

Q Do they occasionally rerail cars that were derailed in the area of the dumper?

A In the area of the dumper and the kickbacks, yes.

Q Do they release hand brakes on rail cars.

A We never—they don't. They could, but it's really not an assigned duty to them. They will assist—sometimes when we have a car derailed it's necessary to tie the hand brake up for safety sake. So then if they tie it up, it would be their responsibility to untie the hand brake.

Q I also asked you earlier when we were meeting about the breaking up of frozen coal. For Your Honor's benefit, the reason I am asking you these questions is these facts are contained in Mr. Wilson's affidavits which he is going to submit to the Court. That's why I'm asking him this terminology. I'm not sure what it is either.

Are you familiar with that term?

A Yes.

Q Do machinists do that?

A Machinists could. It would not be an assigned duty unless they had to make a repair to a hammer mill.

Q What is a hammer mill?

A A hammer mill is a mechanism that we have in the hoppers below the dumper where the coal will come out of a hopper car into a pocket prior to going to the belt. And it [T:32] will—in wintertime after it's frozen it will come out in large chunks, to say the least, and a hammer mill is a mechanical means of breaking the coal up so that it will feed through to the belts and henceforth to the ship.

And if a hammer mill breaks down, then it could become the responsibility of the machinist to have to get some of it away so we can get in there and repair it.

Q So it is really related to the repair of the dumping facility?

A That's correct.

Q All right. Now, Mr. Goode, in his deposition, which I don't know if you had an opportunity to read and which will be submitted to the Court, said that he worked primarily on forklifts and trucks as opposed to the coal operation. Is that true?

A No, I wouldn't—that's—I haven't read his deposition, but the reason I said 99 percent, we have two forklifts at the coal piers, six or eight trucks. But they would work on them, yes. There's no question from time to time they might, but not a predominance, no.

Q Is it generally the people assigned to the piers department generally don't spend their time working on forklifts and trucks, I take it?

A That's right.

Q If there was a piece of equipment down there [T:33] they worked on primarily in the coal loading or unloading process, what piece of equipment would that be? I am talking about machinists now. Would one piece of equipment be worked on more than others?

A Well, I think the dumper gives us, in general, more problems than others because of the many, many mechanical facets of it.

Q Okay. To you, you are familiar with the retarders that this gentleman was working on the day he was injured, are you not?

A Yes, I am.

Q I know you have described briefly earlier what that is. Can you tell us how a retarder works?

A The retarder is on a—let me back up just a little bit to give a thorough picture of them.

The track that comes onto the dumper of course is standard gauge for the railroad. It is secured to a table. For better terms we call it a platen. It's a movable thing. The retarder sits inside the gauge of the rail. As the car comes on and we wish to slow it down and/or to finally stop it, then the retarder activates the operator—the operator activates the retarder which applies pressure into the inside wheel face of the wheel to stop at that location.

Q Is this retarder different than other braking systems used on the railroad?

[T:34]A It's different in general than other retarders that are used for the same purpose because the other retarders will squeeze each wheel from each side.

Q Why is this retarder different than those others?

A Because of the structural limitations that we have to work within and again the fact that it's on a movable table.

* * *

[T:37]Q You noted the difference, I believe, between these retarders and other retarders. Did you explain that to the Court?

A I thought I did but for -

Q Okay.

A The retarders on the dumper which is within the confines of the platen, instead of squeezing both sides of a wheel to retard this movement just applies pressure to the inside portion of a pair of wheels.

Q And that is because of the pier 6 dumper structure?

A The structural limitations and the fact that the platen does move.

Q To dump the car?

A That's right.

* * *

By Mr. Richardson:

[T:38]Q Mr. Crowder, did you—as you testified earlier, you showed the Court where those retarders are located on the dumpers; is that correct?

A Yes, I did.

Q Is this dumper operation something that is solely used here in Norfolk or is it used all through the railroad?

A The pier 6 dumping operation at Norfolk is not the only one in the world by any means. It's the only one of its type in this portion of the country or the United States, to my knowledge, which does--I'm not an authority on that. But we have other dumping operations. We have a pier 5 right beside pier 6 that dumps coal but by another method. We have a coal facility at Sandusky, Ohio, that dumps coal which is similar to the pier 5 operation.

Q Is is always dumped in vessels?

A Yes.

Q Is the retarder operation that you have described—as I understand it, that's the thing that Mr. Goode was repairing on the day he was injured; is that [T:39] correct?

A Yes.

Q Is that essential to this pier 6 dumping operation?

A It's a very integral part of it. If we couldn't stop and hold the car when it got onto the dumper, we would be sitting there all day either trying to pull the cars back or by some means get them back in position. Yes, it is important. If it doesn't work, we don't dump.

Q Does the dumper have to be shut down in order to repair or maintain this retarder?

A Yes, sir, it sure does.

Mr. Richardson: Okay. I believe that's all the questions I have of him, Your Honor. If Mr. Wilson has some.

CROSS-EXAMINATION

By Mr. Wilson:

Q Mr. Crowder, these coal cars that are brought to Lambert's Point, where do they originate?

A Coal fields of Southwest Virginia, West Virginia and Kentucky.

Q Are they loaded at the coal mines to be brought to Lambert's Point?

A That's correct.

* * *

[T:41]Q All right. And what is thepurpose of the barney yard?

A The cars are classified and go up into these tracks. We perform the landing, which is entirely another subject, but we will take a car off of track 1 and maybe the next car comes off track 9. Then we have brakemen up here that will cut the car again with the mechanical mechanism the car is equipped with, leave the arrows with them, let them roll down and then we will classify it, if you may again, as they come into these switches.

Q Are the railroad brakemen the same people you called trainmen earlier?

A Yes.

Q Are trainmen people that are assigned both closer to the water and further away from the water than these retarders that you were speaking of on the dumper?

A Yes. A trainman will be stationed on the water end of each of the dumpers when we are in operation. There's also another trainman on the inshore end off the dumpers. There's one at the cutter station.

* * *

[T:43]The Court: Well, they ride it only for the purpose of hitching a ride? Why would they do that?

The Witness: When a car that has been put on the dumper that's misclassed—there are hundreds of classes of coal—and they have to get it off, or we have a mechanical breakdown that we can't dump that car and have to get rid of it so we can repair it at the facility. So I can't say that it never happens, but's so remote that I can't remember the last time it was done.

By Mr. Wilson:

Q But you do agree that a trainman is customarily working in an area closer to the water than this retarder that you were speaking about; is that correct?

A He's assigned to work closer to the water than the retarders, yes.

Q What is his job?

A That trainman?

Q Yes, sir.

A He ensures that the cars get off the dumper and he classifies cars as they come off the dumper. A for instance, if you may, is we classify cars coming off the dumper between 100-ton and a 70-ton car and different railroad's ownership.

* * *

[T:46] By Mr. Wilson:

Q What does BC stand for?

A From B belt to C belt.

Q It's a belt change house; is that what it is?

A Yes, sir. You don't change belts, so that we are talking the same terms. It's where the coal transfers from one belt to another belt.

Q Okay. If you will, why don't you draw a circle now where the dumper operation is where the coal is dumped from the car at the retarders.

A (The witness complied.)

Q All right. And what are these lines that run between these two red circles?

A That's your B belt. B and 1 belt.

The Court: Underground, aren't they?

The Witness: Partially underground and partially above.

By Mr. Wilson:

Q If you will, why don't you draw an arrow between those two circles for us.

A (The witness complied.)

Q Now show me where the coal goes when it changes from one belt at the BC house onto another belt.

A (The witness complied.)

Q And what is its final destination there?

[T:47]A To another series of belts, but its final destination is shipped [sic] underneath the loader.

Q On the first set of arrows, this is coal en route to the ship and it can't be diverted for any reason?

A It can be diverted.

Q It can. Where?

A We have recircle bins up here in case of a catastrophe.

Q Can't you reverse the belts going into the BC house and load that coal in the railroad cars?

A No, sir.

Q Are you sure of that?

A I'm positive.

Q Is there any way that coal can be diverted from the time it hits the first belt under the dumper as opposed to putting it into a ship? Anyplace on land I am speaking of.

A On land?

Q Yes, sir.

A No.

Q If the other belt doesn't pick it up you don't have any way to divert the coal; is that true?

A No. It just piles up inside the BC house. If that belt were broke down and this one continued to operate.

* * *

REDIRECT EXAMINATION

[T:66] By Mr. Richardson:

Q Mr. Crowder, it wasn't clear on the record. The trainmen, the brakemen that Mr. Wilson asked you about that are in the vicinity of the dumper, they don't operate any of that equipment, do they, other than the rabbit that's on the back track?

A That and the winch. That's the only things that [T:67] they—

Q They don't go out to the piers as the machinists do to work on the shiploaders and those kinds of equipment?

A No, they do not.

Q They don't operate any of that equipment?

A No, they do not.

Q Mr. Goode, since he came back to work in '79, has he been assigned principally at the piers?

A To the best of my knowledge, he's been at the piers or that's where I've known him is at the piers.

Q He was assigned there when he was injured, was he not?

A That's correct.

Q And had been assigned for sometime prior to that; is that right?

A Yes.

Q There was some discussion about where these gentlemen report. Where do machinists such as Mr. Goode report in the morning?

A To the mechanical or the motive power building at the coal piers.

Q Can you show that to the Judge on this plat? I believe it is designated. Is that the motive power building?

A Yes.

Q And in this picture showing the thawing shed, is [T:68] that the two-story big building?

A That's correct.

Q Why is that building located down where it is?

A It was placed there—I don't know when it was built, but it was placed there to facilitate the piers to the coal handling equipment or the dumping equipment.

Q Approximately how far is that from the water?

A 150 feet, approximately.

Q Is it along the same line offset from the water as the dumpers are, approximately? Are they adjacent?

A Well, they are somewhat side by side. The dumper is a little bit further from the water.

Q Okay. Now, Mr. Wethington who Mr. Wilson asked you about, he is assigned to the maintenance gang?

A Yes, sir.

Q He is not assigned to the piers, I take it?

A His bid in job right now is the maintenance gang, yes.

Q And Mr. Goode, as you testified previously, didn't work at the roundhouse or on 38th Street hopper or the maintenance gang work that you have described; is that correct?

A Right. His bid job is for the piers.

* * *

RECROSS EXAMINATION

[T:71] By Mr. Wilson:

Q Do you have knowledge there is a U.S. Steel plant in Alabama that unloads rail cars and coal?

A I have no personal knowledge of that.

Q But you do have knowledge there other facilities that unload coal not related to ships or piers or anything else; isn't that true?

A That's correct.

Mr. Wilson: That is all I have, Your Honor.

Mr. Richardson: Thank you, Mr. Crowder.

Judge, do you have any questions?

The Court: I have no questions.

Mr. Richardson: I am going to get Mr. Bates if that's all right.

DILLARD BATES, called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richardson:

Q Mr. Bates, you have been sworn in. Give us your name, please.

A Dillard Bates.

Q And where do you live?

[T:72]A 3612 Terry Drive, Norfolk, Virginia.

Q And by whom are you employed?

A Norfolk Southern Corporation.

Q And what is your job?

A General foreman of piers.

Q General foreman of piers?

A Yes, sir.

Q Who is your supervisor, your boss?

A Mr. H. R. Crowder.

Q That is this gentleman right here?

A Yes.

Q Are you also in the department of the motive power, the mechanical department?

A Yes, sir.

Q As general foreman of piers, are you Mr. Goode's boss?

A Yes.

Q Okay. And how long have you known Mr. Goode?

A I've known Mr. Goode since back in 1979 when he came with the railroad or before that.

Q Okay. Did Mr. Goode—are you privy to what Mr. Goode does on a day-to-day basis?

A Yes.

Q And why is that?

A Because I'm general foreman, his supervisor [T:73] answers to me.

Q And do you participate in assignments to gentlemen assigned to the piers department?

A Not directly. Indirectly.

Q Okay. Explain that.

A I have a machinist supervisor that Mr. Goode comes under who reports to me and he makes daily assignments.

Q Okay. But you participate in those decisions?

A Yes.

Q How many machinists do you all have down at the piers department?

A At the piers? I believe right now we have about 19.

Q Okay. And since '78 or '79 when Mr. Goode returned to the railroad, has he generally worked in the piers department?

A Generally, yes. I believe there was on period that he worked in the maintenance gang for a short period.

Q But primarily he's worked at the piers?

A Primarily at the piers, yes.

Q Okay. Did he come on as a line tender helper?

A Yes.

Q What does a line tender helper do?

A They help tie up ships or if they are not tying up ships they can be assigned to help the electricians or the [T:74] machinists or any general help that you need.

Q What equipment is the motive power piers department responsible for?

A They are responsible for the equipment and operation of the piers, the dumpers, pushers, loaders is their main responsibility at the piers.

Q The other classifications, I believe, in your department are pipe fitters, electricians and operators which are also in the electrical craft; is that correct?

A True.

Q What union is the machinists in?

A It's IM—and I'm terrible because I don't know the official designation of the machinist's union.

Q There are no trainmen or UTU people that work in your department—

A No.

Q —do they?

A re they allowed to operate or repair any of the equipment that is in your department?

A No. None of the trainmen, no.

Q What union are the electrical workers in?

A They come under IBEW.

Q Okay. And the pipe fitters?

A It's SCMIA. It's a sheet metal workers union that takes in pipe fitters and sheet metal workers.

[T:75]Q Are the line tenders a member of the IBEW, the electrical workers?

A Yes. The line tenders come under the electrical union, IBEW.

Q All right. Tell me in a general way what machinists such as Mr. Goode assigned to the piers do on a day-to-day basis.

A They are assigned to any mechanical trouble that we would have working the retarders on the dumpers, or they could be assigned to work the pushers or your barney—pushers up the hill; any trouble, breakdown and the repairs of them. Or out on the loaders, any problems we have, mechanical problems with couplings on generators or tack generators or mounting or the alignment of or pulleys. Changing pulleys. Bearings on pulleys. Bearings on wheels and loaders.

Q All the equipment you are describing is equipment used in the dumping of coal from the thaw shed railroad east?

A All used for the sole purpose of dumping coal.

Q Okay. Do they have occasion to deal with rail cars?

A On occasions if we get what we call a bulge side with a broken top coping rail, they will—so that they can get it on the dumper, they will make a burn on it. This is something to burn it so it can get clearance. Get it on the [T:76] dumper. Or if the kickbacks—at times we have what they call tight brakes. They will knock a pin out of the brakes so they will freely roll on through the empty yard.

Q Okay. Now, you are aware that Mr. Goode was injured when he was repairing a retarder?

A Yes, I am.

Q Can you tell the Court what a retarder is?

A A retarder is a mechanism on the dumper that allows the operator to stop the hopper cars on the dumper under the arms at the proper place.

Q Who operates this retarder?

A The operator, dumper operator.

Q Is he in the mechanical craft and also a member of the motive power department?

A Yes.

Q Assigned to the pier?

A Assigned to the pier.

Q Are you aware of retarders used generally throughout the railroad?

A Yes.

Q Do the retarders used on dumper 6 differ from the other type retarders?

A Yes. It differs from most other retarders generally on the railroad, yes.

Q First of all, why does it differ?

[T:77]A Because of the space and the—on the dumper they have what we call a platen. It's movable. Normally retarders in the yards squeeze a wheel from both sides. These retarders only squeeze to the inside of the wheels. Squeeze up against one side of the wheel. And through linkage makes it different the way it applies on the platen retarders.

The Court: Let me ask a question. If the retarder on pier 5 is different than all the other retarders in the world but does the same thing by a different method and it's different from the retarder on pier 6, what significance is that? Why do I care about that?

Mr. Richardson: I am not saying pier 5 and pier 6. I'm talking about pier 6.

The Court: Reverse them. What difference does it make?

Mr. Richardson: Again, Your Honor, I anticipate that Mr. Wilson will argue that these are the same throughout the railroad and therefore this gentleman is repairing equipment that everybody else would repair on the railroad. And I believe—

The Court: This is pier 5 we are talking about.

Mr. Richardson: Pier 6.

The Court: Well, now it's different from the one on pier 5, isn't it?

[T:78]Mr. Richardson: I don't know that.

The Witness: Some difference. Similar and the same but some difference between pier 5 and pier 6.

By Mr. Richardson:

Q Is pier 5's retarder also distinguishable from normal railroad retarders?

A Yes, it is.

Q How is that?

A It retards squeezing on the inside of the wheels.

The Court: But they all do the same thing, don't they?

Mr. Richardson: Stop the car.

The Court: Yes.

Mr. Richardson: Yes, sir.

By Mr. Richardson:

Q Now, I have also shown you the photographs and the plats, have I not?

A Yes.

Q Do the symbols on there show the relevant landmarks down at the pier's area?

A Yes.

Q Where does Mr. Goode report to work?

A He reports to the motive power department at the piers.

Q Where is that building located?

[T:79]A It's located on the waterfront. The railing where we do power work.

Q Is that where your office is?

A My office is in this building, yes.

Q Mr. Bates, on a day-to-day- basis, how much time does Mr. Goode and similar persons, machinists, assigned to the motive power piers department work on the dumpers?

A On the dumpers alone?

Q Yes.

A It can vary. A lot of times they can spend the entire day on it. It varies as to how much problem or how much wear you have in your retarders or what you have.

Q Do they spend the majority of the time working on dumpers, shiploaders, conveyor belts, the thawing shed equipment? Is that the primary portion of their time?

Mr. Wilson: Your Honor, I think he's testifying again.

The Court: He was testifying.

Mr. Richardson: I am testifying and I know what he's going to say.

The Witness: 98, 99 percent of the time is spent directly with the coal loading operation.

By Mr. Richardson:

Q Mr. Bates, do these gentlemen spend a lot of time working on forklifts and trucks?

[T:80]A Not a lot of time. We do have two forklifts that we work on, but a very small percentage of the time would be working on any forklifts or trucks.

Q What about fixing these rail cars you talked about earlier?

A No repair of rail cars. Just work to get them to move out. No repairs of rail cars.

Q Okay. Once coal is put on the conveyor system, that being the conveyor belt underneath the dumper, does that coal generally go directly to the vessel without stopping?

A It goes to the vessel, yes, without stopping, to transfer points to load it. It's the only pace it can go.

Q It can't be diverted once it's put on that belt?

A It can be diverted to what we call bins out on the loader but it's then directly put back on the belt into the vessel because at times you have to put it in a bin when you reverse your movement of your load on your belts. You can't travel the coal when you put it in the bin and put it back on the belt to the vessel. There's nowhere it can go but to a vessel.

Q You are familiar, again, with the retarders that this gentleman was working on. To work on that retarder, does pier 6 operation have to be shutdown?

A Yes. If it was not retarding the cars properly because you couldn't stop the cars properly on the dumper to [T:81] dump them if they are not operating properly.

Q So to work on the retarders that this gentleman is working on, the operation would have to shut down? The dumping operation?

A Yes. On that one particular side.

Q Okay. If the retarders on the other side were inoperative, that part would have to be shut down also, would it not?

A Yes.

Q It wouldn't affect what went on behind it, would it, the thawing shed operation or the barney or the pusher or the scales?

A It wouldn't affect it other than it would mean you would have cars sitting there and you could not dump.

Q Is this dumper operation unusual for the railroad, this pier 6 dumper operation?

A It's the only operation of its type on the railroad.

The Court: Again, is that something that is referred to in some case law somewhere? I don't see the significance of that. I mean if I'm supposed to, tell me. Is that something that was mentioned in some case law somewhere?

Mr. Richardson: Your Honor, pier 6 dumper is different. Because it's different it requires different [T:82] retarders, it involves everything else. That's just what I am trying to point out to you. You may take it with a grain of salt, but I feel like it just shows that this is a coal unloading operation and that it is different than normal railroad work. If that is significant to you. It may be after reading the case law.

The Court: All right.

By Mr. Richardson:

Q Are you familiar with Robert Jones, a gentleman hurt as a machinist?

A Yes.

Q Where was he hurt?

A In the shop.

Q What was he doing?

A He was repairing a retarder cylinder.

Q Okay. Was he also a machinist?

A Yes, he is.

* * *

Q Mr. Bates, who controls the belts and the idle arm assembly that goes from the dumpers to the ships? Who works on those?

A Who controls the belts and works on them?

Q Yes, sir.

A The motive power department, my department. The [T:83] operators in the cab control them. Working on them, maintenance of them, comes under my motive power machinist and electric.

Q Do they also work on the machinery out in the shiploaders themselves?

A Yes.

Q What about the trim track that the shiploaders move along?

A Pardon?

Q Is there a track out there that the shiploaders themselves move back and forth on?

A Yes. The loaders will travel the length of the pier, yes.

Q Who works on that trim track?

A The motors and all related equipment, machinists on bearings, mechanical end; electrical people on the electrical end.

* * *

CROSS-EXAMINATION

[T:86] By Mr. Wilson:

Q Mr. Bates, you mentioned the operation of line tenders. They aren't machinists, are they?

A Line tenders are not machinists, no.

Q They aren't in the same union as machinists, are they?

A No.

Q Prior to the unloading of railroad cars, would you agree that machinists participate in the repair of railroad cars?

A Machinists assist in the repair of railroad cars?

Q Yes, sir. Prior to them being unloaded in the south side dumper.

A No, not frequently, no.

Q Do they work on railroad cars?

A Machinists?

Q Yes.

A No, sir.

Q How about the burning? Where does that take [T:87] place?

A It takes place at—most of the time we will do it at the scales. If we can't do it at the scales, we will do it at the barney pier.

Q That is well before the car has been dumped, isn't it?

A Yes. Before the car is dumped, yes.

Q Maybe you didn't understand. The preface to my question was prior to the unloading of the cars on the dumper, don't machinists work on railroad cars?

A They will make burning on what we call bulge cars where the top coping rail is broken at an angle where we cannot put it on the dumper. We will burn it on a taper so it will go to the dumper.

The Court: What does it mean burning?

The Witness: You have an angle, and actually what it is is sometimes I load the car and it will break in the middle. If the point is towards where it sits on the dumper you only have six inches of clearance. It's real close. And if you got a jagged edge sticking out, you can catch and turn what we call a clamp after they pull the cars on the dumper. We burn it in a taper or burn it off so it won't catch on these in this close clearance.

By Mr. Wilson:

Q And after the cars are unloaded on the dumper, isn't it true that machinists are called upon to help in the [T:88] rerailing of derailed railroad cars?

A Yes. If we have a derailment.

Q All right, sir. Don't they work on a device called a pusher, which has been described as a small electric locomotive, prior to the unloading of the cars?

A Yes. The pusher at the barney piers, yes.

Q Don't they work on the repair and maintenance of the barney which is a device used to push the cars up the incline before the dumper?

A Yes, they do.

Q Don't the trainmen activate the barney, railroad trainmen?

A No, sir. The railroad trainmen gives our dumper operators a signal that it is ready to pull and he actually pushes the button to pull the barney.

Q So they participate in the process of signalling which causes the barney to be started?

A Right. They have a green light down there. When he takes the retarders off a green light somes on. Then the barney comes.

Q So machinists do work in and about railroad cars with the movement of railroad cars both before and after they are dumped?

A Yes.

Q We have discussed a place called the BC house.

[T:89]A Yes.

Q And I understand that there are belts that run from the south side dumper to this BC house?

A Yes.

Q Does that belt have a designation?

A The BC House?

Q No. The belt itself. Is it like B belt?

A Yes. B and Bl belt, yes.

Q So B belt goes from the south side dumper to the BC house?

A Under normal operation, yes.

Q And then the coal is dumped on another belt that goes from the BC house to the ships; is that correct?

A That's correct.

Q What is the designation of that belt from the ships to the BC house?

A From the ship to the BC house? Under normal operation, B belt would dump onto C belt. C belt would go down the pier, up through the loader.

Q And that is when they put the coal in the ships, right?

A No, sir. It then dumps onto D belt.

Q So there is another belt involved?

A Which is a belt going across out to your apron. It belts onto E belt.

[T:90]Q Is there a shoot [sic] at the back of the BC house where you can place coal?

A There's a shoot [sic] at the back of the BC house?

Q At the back of the BC house.

A Yes. There is a cleanup place back there where the cleanup belts dump off and also a place back there where ifyou have a problem with your belt, if we ever do reverse it, it could dump it out on the ground, yes, sir.

Q So you could actually take the coal after it's left B belt and going onto C belt and you can reverse C belt and dump coal back out through the BC house; is that correct?

A That is not done except in special emergency cases. It cannot be just normally reversed.

Q My question is can you do that.

A It could on special conditions.

Q Has it ever been done?

A I have done it when I have come over a belt with a rip.

Q Couldn't you take the coal you dumped over the shoot [sic] and load it in the railroad cars?

A Yes.

Q As a matter of fact, there's a track that runs right down beside the BC house?

A Yes.

Q And there are railroad cars sitting back there [T:91] most of the time, isn't there?

A Right.

Q And they've got coal in them, don't they?

A Yes, sir.

Q And that coal is coal that came out of the railroad cars upon the dumper, isn't it?

A It's cleaned up coal, yes. It came from all over the piers.

Q And retarders are used to stop cars, aren't they?

A Yes.

Q And they are used all over the railroad system to stop cars, aren't they?

A Yes.

Mr. Wilson: That's all the questions I have, Your Honor. Thank you.

REDIRECT EXAMINATION

By Mr. Richardson:

Q Just a couple, Mr. Bates. Mr. Goode was a line tender when he initially came on the department, was he not?

A When he initially came to the piers.

Q Yes. In '79 or thereabout.

A Yes.

Q The gentleman helping Mr. Goode when he was hurt, Mr. Dowdy, he is a line tender, is he not?

[T:92]A Yes.

Q And line tenders are generally the first step to becoming an apprentice and then an electrician or machinist?

A Normally, yes. We pick apprentices from anyone that is interested and qualified.

Q How far from the water is this dumper?

A The dumper?

Q Yes, sir.

A I would take a guess of 500, 550 feet, approximately, from the water.

Q Okay. And how far from the water is the motive power building?

A About 150 feet to 175 feet, approximately.

Q How far apart are those two dumpers and the motive power department?

A The dumpers and the motive power building? It's about 300 feet. Somewhere in there. Just an estimate. Taking extreme one side to the other.

Mr. Richardson: Okay. I think that's all. That you Mr. Bates.

Mr. Wilson: I have no questions, Your Honor.

The Court: Thank you, sir.

* * *

EXHIBIT DESCRIPTION

1. Plat of Lamberts' Point Terminal
2. Aerial photograph of Lamberts' Point Terminal
3. Aerial photograph of Lamberts' Point Terminal
4. Aerial photograph of Waterside facilities
5. Aerial photograph of dumpers

LANDMARKS IDENTIFIED ON EXHIBITS

A. Pier 6

B. Scales

C. Thawing Shed

D. Dumpers

E. West Shiploader

F. East Shiploader

G. Conveyor System

H. Transfer Shed

I. Motive Power Building

EXHIBIT 1

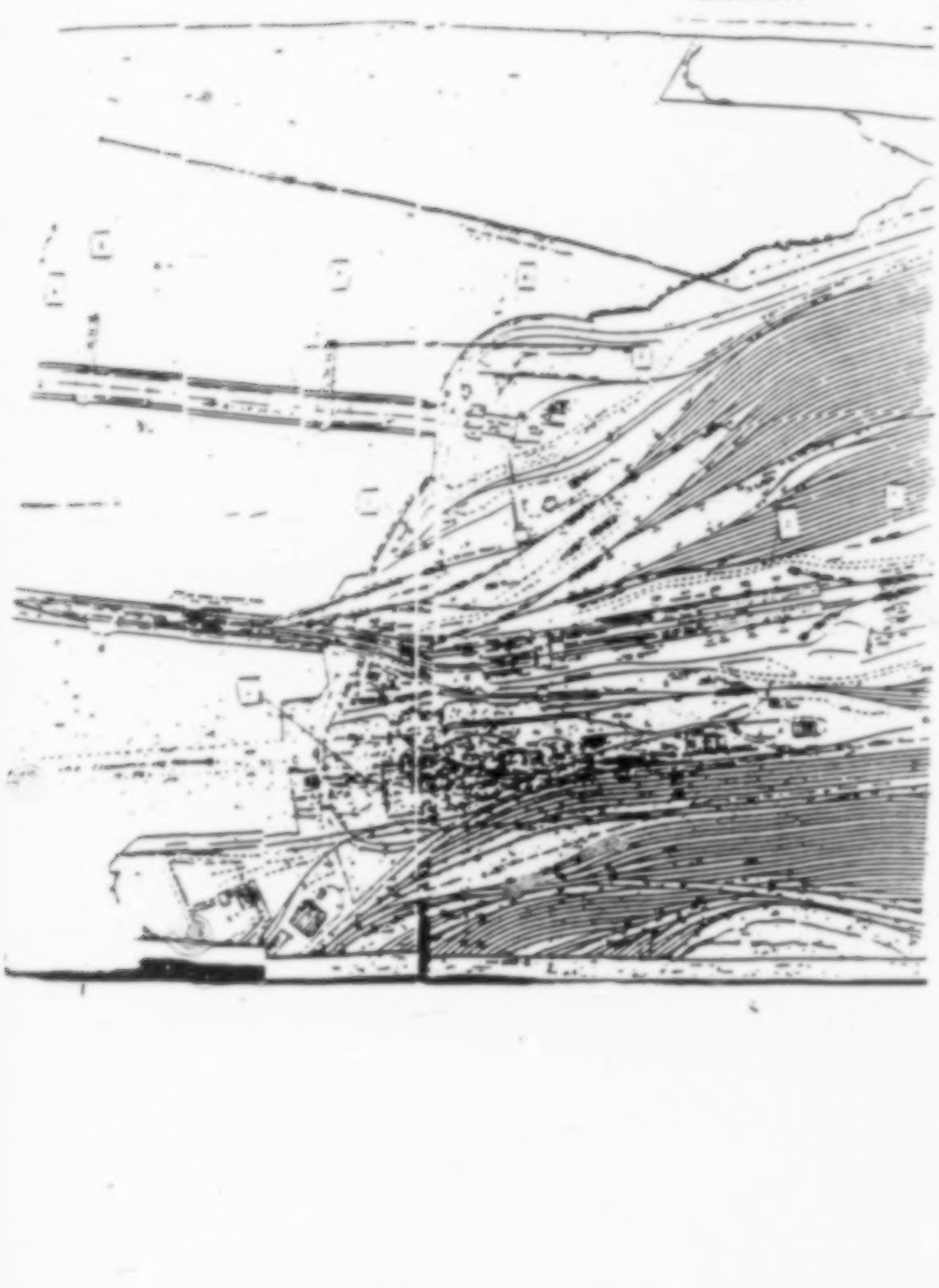


EXHIBIT 2

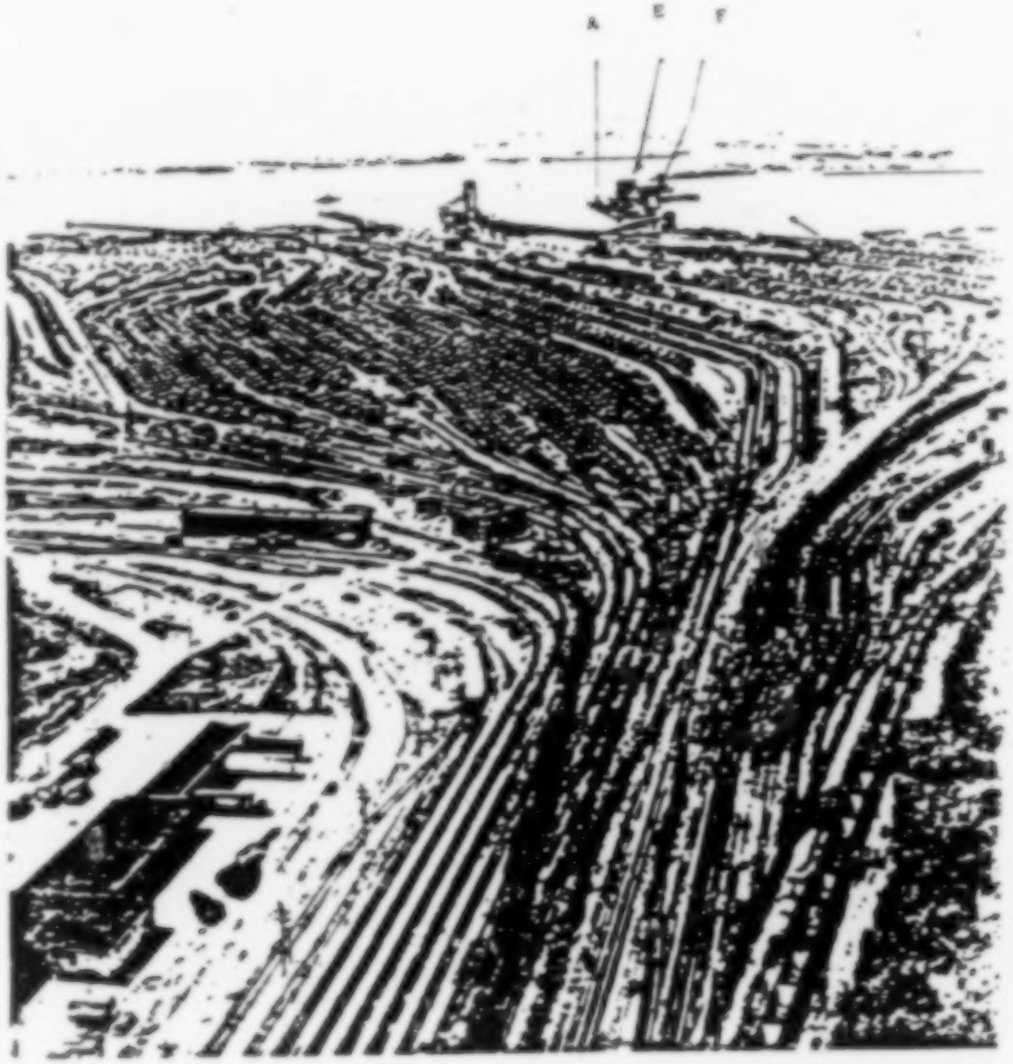


EXHIBIT 3

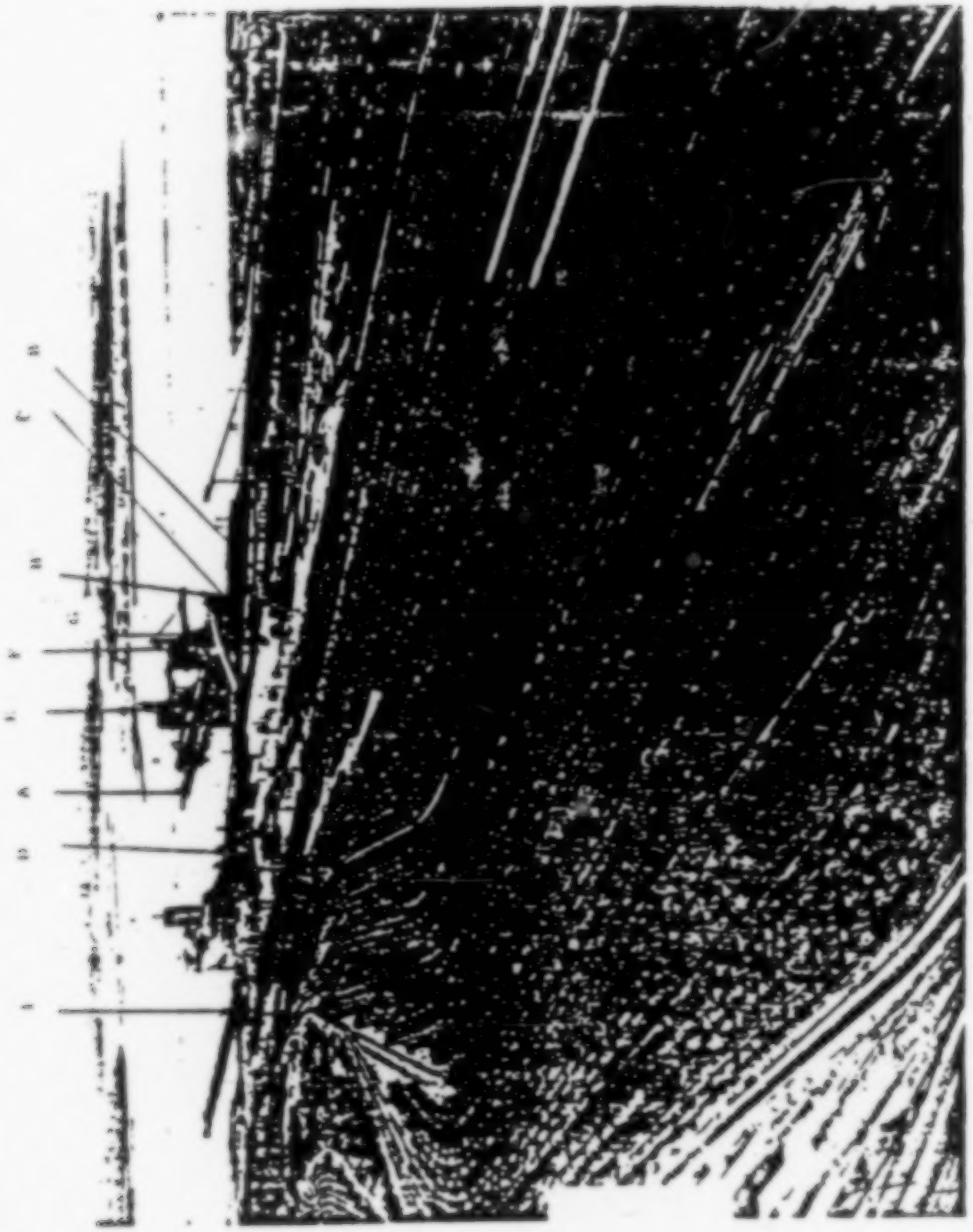


EXHIBIT 4

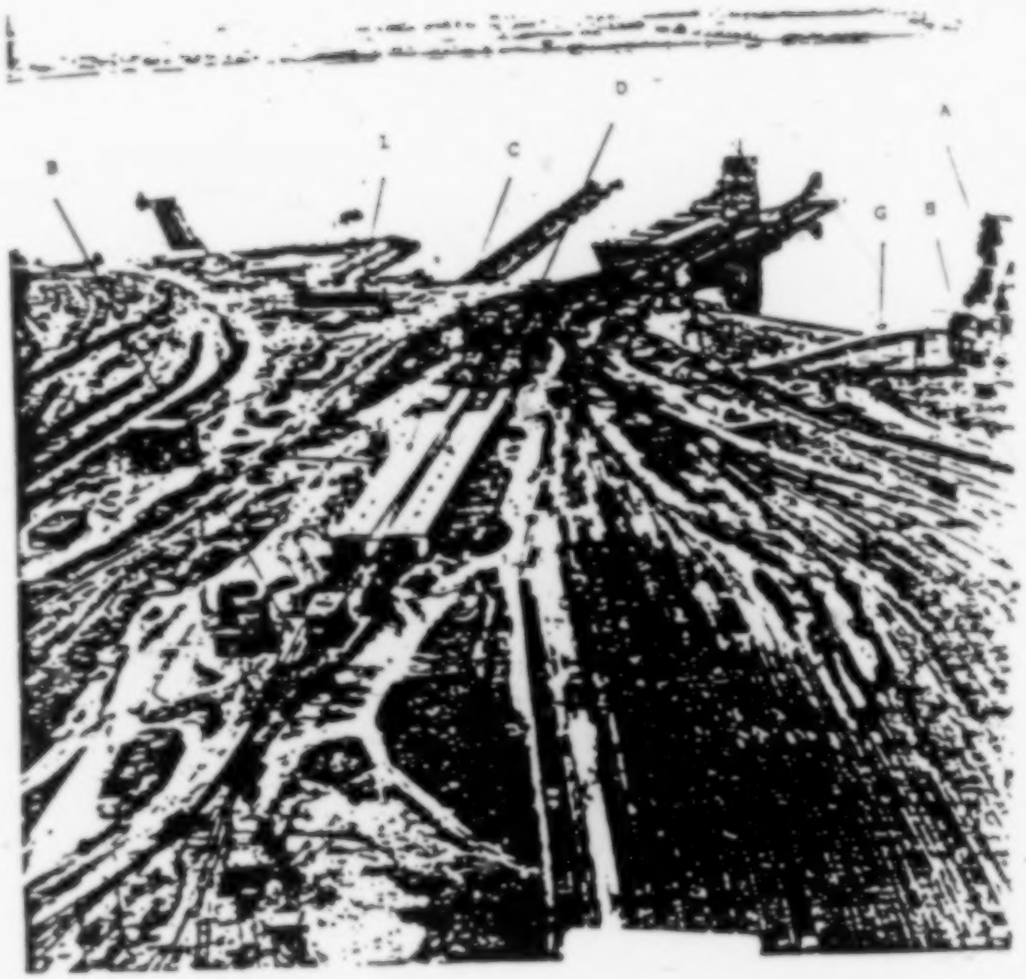
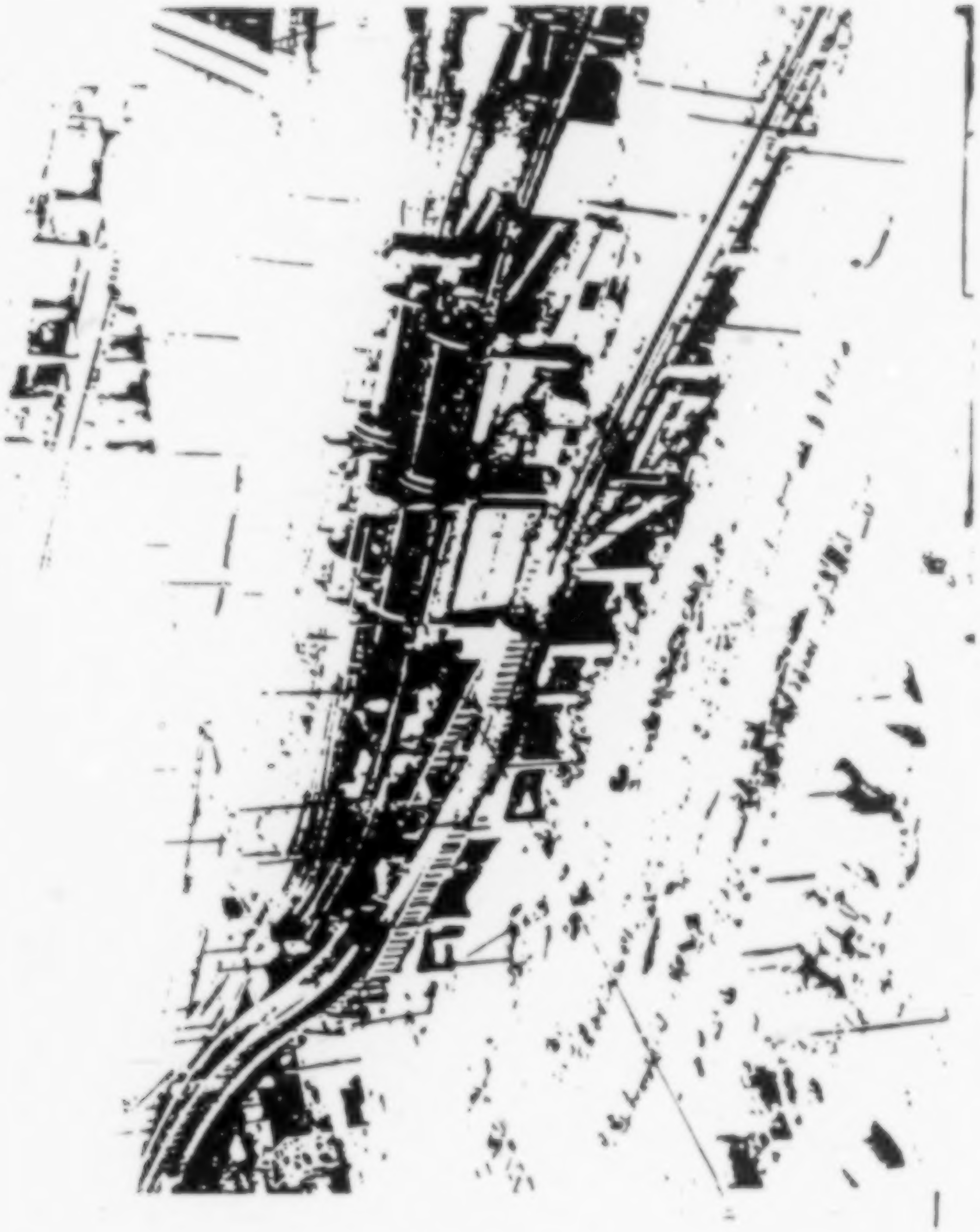


EXHIBIT 5



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,
Plaintiff,
v.
NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant.

DEPOSITION UPON ORAL EXAMINATION OF ROBERT T. GOODE, JR. TAKEN ON BEHALF OF THE DEFENDANT
June 27, 1986

[T:3] Robert T. Goode, Jr., called as a witness, having been first duly sworn, was examined and testified as follows:

EXAMINATION

JOHN Y. RICHARDSON, JR., appearing on behalf of Norfolk and Western Railway Company

By Mr. Richardson:

Q Mr. Goode, my name is John Richardson, and I represent the railroad in this matter.

If there are any questions you don't understand, tell me, and I will try to make them [T:4] understandable. If there is anything you want to change during the deposition, tell me to stop, and I will let you change it.

I am trying to find out what your story is and how you got hurt. All I am expecting are frank answers, which I am sure you will give me.

Q Where do you live, Mr. Goode?

A Norfolk.

Q Give me your address.

A 928 Defoe Avenue.

Q And are you married?

A Yes.

Q What does your wife do?

A She is a police officer.

Q With the city of Norfolk?

A Yes.

Q What is her name?

A Nancy.

Q Any children?

A Yes.

Q Names and ages.

A Jennifer, age 12.

Q Okay. Just one?

A Yes.

Q Okay. No other dependents?

[T:5]A No.

Q Okay. Are you a native of Norfolk?

A Yes, sir.

Q And did you go to high school here in Norfolk?

A Yes.

Q Where did you go?

A Maury.

Q When did you—did you graduate?

A Yes.

Q What year?

A Sixty-nine.

Q Did you do anything after graduating as for a education-wise or did you come right to work for the railroad?

A I went to Tidewater Community.

Q For how long?

A About three semesters.

Q Okay. Any particular area of study?

A Police science.

Q Okay. And is that the extent of your post high school education?

A Yes.

Q Okay. What was your first regular job after graduating from Maury?

[T:6]A I was employed with the railroad.

Q What was your seniority date?

A I am not sure.

Q Okay. About what time did you come to work?

A I was working for the railroad while I was in high school. It was probably in '69.

Q Okay. What did you come on as?

A Bridge tender.

Q Okay. How long were you bridge tender?

A And a painter's helper.

Q Both under B & B department?

A Yes.

Q How long were you a bridge tender and painter's helper?

A Approximately three years.

Q And as I understand it, that is under the bridge and building department; is that right?

A Yes, sir.

Q Is that how you classify it?

A Yes, sir.

Q Throughout your years with the railroad, have you always been in that department?

A No.

Q What did you do next after being a bridge [T:7] tender and painter's helper?

A I was drafted in the army.

Q Okay. And about when was that?

A Seventy, July of '70.

Q How long were you in the army?

A Approximately a year and a half.

Q What did you do in the army?

A Infantry.

Q Okay. Did you just exhaust your service or were you discharged for any particular reason?

A Just had an early discharge because the president said it was okay.

Q Okay. And then you came back to work for the railroad?

A Yes.

Q And that was 1972?

A Yes, sir.

Q Okay. What did you come back on as?

A Bridge tender.

Q How long did you stay a bridge tender this time?

A Approximately three months.

Q And then what were you promoted to?

A I resigned and went to work as a police officer.

[T:8]Q Okay. That's after three months in '72. Was that nothing to do with the employment at the railroad? You were just looking for a better job; is that it?

A That's correct.

Q How long were you a police officer?

A Six years and ten months.

Q Just patrolman or—

A Yes.

Q And why did you leave the police department?

A To come back to the railroad.

Q Any particular reason or just tired of being a police officer?

A Tired of being a police officer.

Q When did you come back to work?

A January 19th, 1979.

Q Okay. Did you go back to B & B department?

A No.

Q Tell me what you were employed as that time.

A I went into the motive power department.

Q And have you been in the motive power department from then on?

[T:9]A Yes.

Q To the present day?

A Yes, sir.

Q Tell me a little bit about the motive power department. What is its job primarily?

A What is my job?

Q Let's talk about the department first.

A Basically to run the east end of the railroad.

Q Okay. Is there equipment that the motive power department is particularly responsible for?

A Yes, sir.

Q Tell me about that equipment they are responsible for.

A The thaw sheds, the pushers, the barneys, the dumpers, the conveyer belts.

Q Is it fair to say they are responsible for everything on the railroad east of the thaw sheds.

A Including the thaw shed.

Q Is that where their line sort of stops and comes towards the dumpers?

A No, not really, because we work on equipment at Portlock.

Q What kind of equipment do you work on at Portlock?

[T:10]A Forklifts, railroad engines.

Q Do you do that at Lambert's Point also?

A Yes, sir.

Q Okay. If you had to say what motive power mainly dealt with on a day-to-day basis, would you say the equipment in the coal loading system from the thaw shed to east?

A No, we work on all of the equipment.

Q Okay. And—but I am talking about—do you understand my question?

I am saying, does the motive power department primarily work on the equipment in the coal loading process from the thawing shed to east? Is that your primary responsibility?

A No.

Q Do you spend as much time working on the forklifts as you do the coal loading equipment?

A Yes, sir.

Q Okay. You spend more time working on that stuff like railroad engines and forklifts as you do on the coal loading equipment.

A I would say more time spent on the forklifts and thaw sheds.

Q Okay. More time spent on forklifts than thaw sheds?

[T:11]A No, and thaw sheds.

Q Okay. And barneys and pushers?

What I am getting at is, Mr. Goode, do you spend more time working on thaw sheds and that kind of stuff than you do forklifts and that kind of stuff?

EDDIE W. WILSON, appearing on behalf of Robert T. Goode, Jr.

Mr. Wilson: Excuse me. John, if I could interject this. I am not certain it's clear what you are understanding—what you are asking. If you defined what you consider to be unloading equipment—

Mr. Richardson: I thought I had.

By Mr. Richardson:

Q Assume—

Mr. Wilson: We might not accept your definition, but—

Mr. Richardson: I understand that.

By Mr. Richardson:

Q I will lump everything that goes into the coal dumping and loading process from the thaw sheds east, railroad east as coal equipment. Is that okay? Can you accept that? I am not asking you to agree, but for the purposes of my question, assume that.

Now, percentage-wise, if you can do this, tell me how much time the motive power department spends [T:12] on the coal equipment as opposed to things like forklifts, railroad engines, and that kind of thing.

Mr. Wilson: Before you answer it, I want to object to the form of the question. There has been no foundation laid to show that the coal unloading facilities start at the thaw shed. I think it would be—we are assuming that for the purposes of the question.

Mr. Richardson: Right. I understand that. I am not saying my definition is definitive.

I am trying to get an idea of how much time the motive power department spends on equipment such as the thaw shed, the barneys, the pushers, the dumpers, and what I would classify as coal loading or dumping equipment. Okay.

By Mr. Richardson:

Q Can you answer that question?

A I am not sure.

Q Okay. Who would know that?

A I don't know that either.

Q Who is your supervisor?

A My immediate supervisor is Bobby Jones.

Q And who is his boss?

A Chain of command would be Arnold Meadows.

Q Head of B & B or motive power?

[T:13]A No, assistant general foreman.

Q Okay. Let's keep going. Who is next?

A Dillard Bates or D. T. Bates.

Q What is his title?

A General foreman.

Q All right. Anybody higher?

A Bobby Edwards is assistant master mechanic.

Q Mr. Crowder then?

A Yes.

Mr. Wilson: Is that Herb Crowder we are talking about?

Mr. Richardson: Yes.

By Mr. Richardson:

Q He is the master mechanic, right, Mr. Goode?

A Yes.

Q He is sort of in charge of the motive power department?

A Yes, sir.

Q Okay. Now, since you came back to work with the motive power department in January of 1979, what has been your job? What was your initial job in January of 1979?

[T:14]A Line tender and helper.

Q What does that do? What do they do?

A Basically help the electricians and machinists.

Q Do what?

A Perform repair work.

Q On this kind of equipment we have been talking about earlier?

A On anything.

Q What else did you do?

A Tied up ships on the pier.

Q Okay. Whenever a ship would come in or leave, y'll would tie and untie the ships?

A That's correct.

Q How long were you a line tender and helper?

A Three months.

Q Then what did you become?

A Machinist apprentice.

Q And that essentially means you work on all equipment that you were describing earlier? Is that what the machinist does?

A Yes, sir, works on cars, trucks, forklifts, railroad cars.

Q And how long were you apprentice?

[T:15]A It's a four-year apprenticeship.

Q Have you moved up to a machinist yet?

A Yes, sir.

Q When did that occur?

A I am not sure of the date.

Q All right. How long, a couple of years ago?

A Yes, sir.

Q And you are a machinist today?

A Yes, sir.

Q And I take it a machinist does the same thing a machinist apprentice does essentially?

A Yes.

Q Work on cars, trucks, forklifts, things like that?

A Yes, sir.

Q All right. Just clarify something for me, Mr. Goode. Do you actually go to the car shop and work on cars, rail cars?

A I don't go to the car shop and work on cars.

Q Where do you work on rail cars?

A At the scale office, in the thaw shed, and in the barney pit, and sometimes the dumper.

Q When cars get stuck there or something, is that when you work on them?

[T:16]A Yes, sir. And if something is wrong with the car, we work on it before it goes into the dumper.

Q When you work on a car, it's on the track between the thaw shed and the—whatever the yard is where they go after being dumped?

A Sometimes they are not on the track.

Q What do you mean "sometimes"?

A Sometimes they are derailed, and we have to put them back on the track.

Q Okay. It's generally out of necessity to keep the coal process running, is that fair to say?

A I guess so.

Q Okay. What I am getting at is, you just don't inspect car, and you don't—if you see something wrong that needs to be fixed, you don't stop the coal loading process to work on the cars?

A It would depend on the severity of what needed to be fixed.

Q Okay. [illegible] that something that happens on a regular basis?

A No.

Q Okay. So what do you do most of the time?

A Perform repair work on the equipment for the railroad.

[T:17]Q Okay. All right, Mr. Goode, tell us what happened on the day you got hurt.

A Where do you want me to begin?

Q Let's start with when did you come on that day?

A At 7 a.m.

Q Is that your typical shift, 7 to 3?

A Yes, sir.

Q And when you came on, who do you go to for direction on what to do that particular day?

A Report at the lunchroom at the motive power building.

Q Where is the motive power building?

A Lambert's Point.

* * *

Q All right. Where with respect to the Elizabeth River is the motive power building? Is it down there near the piers or up near the claim department and superintendent's office?

A Approximately 150 yards east of the Elizabeth River.

Q Okay. Near the piers?

A Near them.

Q Okay. You report there. Who tells you what to do, if anybody?

A Bobby Jones.

Q Okay. What did he tell you to do on the day you were hurt?

[T:19]A To go to the south dumper and check and repair the retarders.

Q Okay.

A Retarders are what stops the coal cars.

Q They act like a cushion or something when they unload it?

A Braking system.

Q Is it after they have been unloaded or while they are being unloaded or prior to being dumped?

A Prior.

Q Okay. They are on the dumpers themselves?

A Yes, sir.

Q Tell me a little bit about how the retarders play a role in the dumping process.

A They stop the coal cars in place.

Mr. Wilson: Before you answer that, I object to the form of the question. You are assuming they are involved in the dumping process.

Mr. Richardson: Sure. I understand.

Mr. Wilson: Go ahead and answer it, Bob.

* * *

By Mr. Richardson:

[T:27]Q And how often do you have to replace the sword and pins?

A I don't know. Sometimes you have to replace them, and sometimes you don't.

Q Can you go years without replacing them? Is this something you do every month or every six months or—

A You check them more often, and I am not sure the length of time they last.

Q Okay. You weren't surprised to see they needed to be replaced?

A No sir.

Q Okay. Once you saw that, what did you decide to do?

A Contacted Bobby Jones and told him what the situation was, and he said to replace them.

Q Okay. And is this a big job?

A Yes, sir.

Q Does it require shutting down the dumpers?

A Yes, sir.

Q Okay. Was the dumper shut down during [T:28] this time?

A Yes, sir.

Q There wasn't any coal being loaded?

A No, sir.

Q That is when y'all do the maintenance on the dumpers is when it's down like that?

A Yes, sir.

Q Okay. What does the—tell me a little bit about how you go about replacing these things.

A You have to have an acetylene and oxygen torch, and you take the pins, which are actually bolts, out of the linkage, and you heat up the keeper strap that is over top of one of the pins, that is a pin, not a bolt. You bend it out of the way, and you take the pin out, and usually or supposedly that is all that has to be done. You take the pin out and take the sword out.

On this particular day the bushing that the pin goes through was broke, and I had to take the acetylene and oxygen torch and push the bushing block off. Then I had to go back to the shop and get a new bushing block and new pin and come back to the dumper to replace it.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF ____________, to-wit:

THIS DAY, before me, the undersigned, a Notary Public in and for the Commonwealth of Virginia, personally appeared Ronel Lee Croft, who, after being duly sworn, made oath that the following statements describe the duties and conditions of employment for a machinist holding seniority on Norfolk Terminal, Norfolk and Western Railway Company, Norfolk, Virginia.

12. A Norfolk Terminal railway machinist may be assigned duties at any geographical point on the Terminal. As an example, machinists work at Portlock Yard (approximately 6 miles from Lamberts Point Yard).

13. All machinists on Norfolk Terminal work from a common seniority list and may change jobs at will, based on their seniority standing on this list.

14. Machinists perform jobs on Norfolk Terminal ranging from the repair and maintenance of pier machinery; to the repair and maintenance of railroad locomotives; to the repair of railroad cars; to the repair of hydraulic braking systems; to the repair of bridge raising mechanisms.

15. Norfolk Terminal machinists perform these duties at various geographic locations ranging from the Elizabeth River Piers, the 38th Street car shops and the locomotive round house, all at Lamberts Point Yard; to Portlock Yard (approximately 5 miles from Lamberts Port Yard); to Bridge #7 (approximately 7 miles from Lamberts Point Yard); to Crewe, Virginia (approximately 125 miles from Lamberts Point Yard).

16. Machinists assigned to the Motive Power Department at the Pier end of Lamberts Point Yard have job assignments of working on Pier machinery, both over the water and in the shop; also, work assignments involved with railroad cars and railroad equipment, *prior to the unloading of the cars.* Examples of some of these assignments:

1. the repair of railroad cars;
2. the rerailing of derailed railroadcars;
3. the repair and maintenance of pushers (small electric locomotives);
4. the repair and maintenance of the Barney;
5. the repair and maintenance of retarders; and
6. the release of handbrakes on railroad cars.

17. Retarders, such as those in use on the south side dumper at Lamberts Point Yard, are in use throughout the Norfolk and Western Railroad system and are common to all railroads.

18. The purpose and function of such retarders is to stop railroad cars.

19. The function of the retarders on the south side dumper is to stop railroad cars prior to the cars being unloaded.

20. The conveyor belt system used to load coal on ships begins after the unloading of railroad cars at the southside dumper.

21. After a car is unloaded it continues its cycle back to the coal mines to be loaded again, by continuing up a raised track, and is then returned by gravity to an empty car yard.

22. Different crafts of employees work beside the track on which the south side retarder is located. As an example, railroad brakemen work beside this track, and they are geographically closer to the water and piers than is a machinist working on a retarder.

23. Machinists working on the pier end of the yard are worked side by side, over land, with railway maintenance of way employees:

1. rerailing derailed railroad cars;

2. breaking up frozen coal from railroad cars.

24. As a railroad machinist I am required to pay money to the Federal Railroad Retirement Board.

25. As a railroad machinist I am eligible for retiremen benefits under the Federal Railroad Retirement system.

26. As a railroad machinist I am eligible to receive Railroad Retirement Board unemployment benefits when furloughed or dismissed from this job.

27. As a railroad machinist I am eligible to receive Railroad Retirement Board sickness benefits when I miss time from work due to illness or a disabling injury at home.

28. My work contract is negotiated under the Federal Railway Labor Act.

29. My rights to hearings, and appeals rights of discipline imposed by the Norfolk and Western Railroad, are rights under the Federal Railway Labor Act.

30. The railroad cars repaired by the machinists are used in interstate commerce.

31. The safety standards for railroad cars stopped by the retarders on the south side, Pier 6, are set by Federal regulations, the Safety Appliance Act.

32. A machinist's work on Norfolk Terminal, with the exception of work on machinery that handles coal after the coal cars are unloaded, is in no way even remotely related to the loading or unloading of ships, nor is this work on piers, nor is this work over water. This work deals with machinery used in the repair of coal cars, the repair of locomotives, vehicles, bridges and track machinery such as retarders.

/s/ Ronel Lee Croft

Sworn and subscribed to before me, in the City of Norfolk, State of Virginia, this 11th day of September, 1986.

/s/ Martha Early

My commission expires: 10-10-88

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF ____________, to-wit:

THIS DAY, before, the undersigned, a Notary Public in and for the Commonwealth of Virginia, personally appeared Raymond D. Wethington, who, after being duly sworn, made oath that the following statements describe the duties and conditions of employment for a machinist holding seniority on Norfolk Terminal, Norfolk and Western Railway Company, Norfolk, Virginia.

1. A Norfolk Terminal railway machinist may be assigned duties at any geographical point on the Terminal. As an example, machinists work at Portlock Yard (approximately 6 miles from Lamberts Point Yard.).

2. All machinists on Norfolk Terminal work from a common seniority list and may change jobs at will, based on their seniority standing on this list.

3. Machinists perform jobs on Norfolk Terminal ranging from the repair and maintenance of pier machinery; to the repair and maintenance of railroad locomotives; to the repair of railroad cars; to the repair of hydraulic braking systems; to the repair of bridge raising mechanisms.

4. Norfolk Terminal machinists perform these duties at various geographic locations ranging from the Elizabeth River Piers, the 38th Street car shops and the locomotive round house, all at Lamberts Point Yard; to Portlock Yard (approximately 5 miles from Lamberts Port Yard); to Bridge #7 (approximately 7 miles from Lamberts Point Yard); to Crewe, Virginia (approximately 125 miles from Lamberts Point Yard).

5. Machinists assigned to the Motive Power Department at the Pier end of Lamberts Point Yard have job assignments of working on Pier machinery, both over the water and in the shop; also, work assignments involved with railroad cars and railroad equipment, *prior to the unloading of the cars.* Examples of some of these assignments:

the repair of railroad cars;

the rerailing of derailed railroad cars; the repair and maintenance of pushers (small electric locomotives);

the repair and maintenance of the Barney;

the repair and maintenance of retarders; and

the release of handbrakes on railroad cars.

6. Retarders, such as those in use on the south side dumper at Lamberts Point Yard, are in use throughout the Norfolk and Western Railroad system and are common to all railroads.

7. The purpose and function of such retarders is to stop railroad cars.

8. The function of the retarders on the south side dumper is to stop railroad cars prior to the cars being unloaded.

9. The conveyor belt system used to load coal on ships begins after the unloading of railroad cars at the southside dumper.

10. After a car is unloaded it continues its cycle back to the coal mines to be loaded again, by continuing up a raised track, and is then returned by gravity to an empty car yard.

11. Different crafts of employees work beside the track on which the south side retarder is located. As an example, railroad brakemen work beside this track, and they are geographically closer to the water and piers than is a machinist working on a retarder.

12. Machinists working on the pier end of the yard are worked side by side, over land, with railway maintenance of way employees:

rerailing derailed railroad cars; breaking up frozen coal from railroad cars.

13. As a railroad machinist I am required to pay money to the Federal Railroad Retirement Board.

14. As a railroad machinist I am eligible for retiremen benefits under the Federal Railroad Retirement system.

15. As a railroad machinist I am eligible to receive Railroad Retirement Board unemployment benefits when furloughed or dismissed from this job.

16. As a railroad machinist I am eligible to receive Railroad Retirement Board sickness benefits when I miss time from work due to illness or a disabling injury at home.

17. My work contract is negotiated under the Federal Railway Labor Act.

18. My rights to hearings, and appeals rights of discipline imposed by the Norfolk and Western Railroad, are rights under the Federal Railway Labor Act.

19. The railroad cars repaired by the machinists are used in interstate commerce.

20. The safety standards for railroad cars stopped by the retarders on the south side, Pier 6, are set by Federal regulations, the Safety Appliance Act.

21. A machinist's work on Norfolk Terminal, with the exception of work on machinery that handles coal after the coal cars are unloaded, is in no way even remotely related to the loading or unloading of ships, nor is this work on piers, nor is this work over water. This work deals with machinery used in the repair of coal cars, the repair of locomotives, vehicles, bridges and track machinery such as retarders.

In addition to the above, I attest that as local Chairman (Labor Representative) representing machinists on Norfolk Terminal, the following:

I progress discipline appeals to my General Chairman through the Federal Railway Act.

All benefits such as unemployment and sickness benefits are payable through the Federal Railway Retirement Board.

All machinists on Norfolk Terminal that I represent are treated as railway employees, *except* when one is injured at the east end of Lamberts Point Yard (the River End).

All machinists, in all parts of the Terminal, work under work rules set by the Railroad for all railroad employees. Also, they all work under safety rules set by the Railroad for all railroad employees on all parts of the Railroad system.

/s/ Raymond D. Wethington

Sworn and subscribed to before me, in the City of Norfolk, State of Virginia, this 3rd day of September, 1986.

/s/ Martha Early

My commission expires: 10-10-88

PETITIONER'S

BRIEF

⑤

No. 87-1979

Supreme Court, U.S.
FILED
APR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.
NANCY J. SCHWALB,
Respondent.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.
WILLIAM MCGLONE,
Respondent.

BRIEF ON THE MERITS OF PETITIONER CHESAPEAKE AND OHIO RAILWAY COMPANY ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

WILLIAM T. PRINCE
Counsel of Record
EDWARD L. OAST, JR.
JOHN Y. RICHARDSON, JR.
JOAN F. MARTIN
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510
804-624-2600

Attorneys for Petitioner
Chesapeake & Ohio
Railway Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

51pp

QUESTIONS PRESENTED

I. Whether workers who clean and maintain coal loading machinery at a maritime situs fulfill the status requirement of the Longshore and Harbor Workers' Compensation Act?

II. Whether a state court's adherence to a narrow definition of LHWCA status, despite uniform federal precedent to the contrary, effectuates the intent of Congress to create a simple, uniform standard of coverage?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CASES AND AUTHORITIES iii
REFERENCE TO OPINIONS BELOW 2
JURISDICTION 3
STATUTORY PROVISIONS 3
STATEMENT OF THE CASE 3
  I. Factual Summary 3
  II. Procedural History 5
SUMMARY OF THE ARGUMENT 7
ARGUMENT 8
  I. McGlone and Schwalb are Maritime Employees 8
  II. The Schwalb-McGlone Decision Offends the Congressional Goal of a Uniform Standard 19
CONCLUSION 23

TABLE OF CASES AND AUTHORITIES

Cases: Page

Arbeeny v. McRoberts Protective Agency, 642 F.2d 672 (2d Cir.), *cert. denied*, 454 U.S. 836 (1981) 18,19

Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) 16

Bradshaw v. McCarthy, 3 BEN. REV. BD. SERV. (MB) 195 (Jan. 26, 1976), *petition for review denied*, 547 F.2d 1161 (3d Cir.), *vacated and remanded*, 433 U.S. 905 (1977) 12

Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037 (4th Cir. 1980) 22

Chesapeake & Ohio Railway v. Martin, 283 U.S. 209 (1931) 20

Conti v. Norfolk & Western Railway, 566 F.2d 890 (4th Cir. 1977) 16

Director, Office of Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297 (1983) 7,10

Dravo Corporation v. Banks, 567 F.2d 593 (3d Cir. 1977) 18

England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964) 20

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) 16

Freeman v. Norfolk & Western Railway, 596 F.2d 1205 (4th Cir. 1979) 21,22

Garvey Grain Co. v. Director, Office of Workers' Compensation Programs, 639 F.2d 366 (7th Cir. 1981) 14

Table of Cases and Authorities Continued

Page

Goode v. Norfolk & Western Railway, No. L-86-335 (Norfolk Cir. Ct. Dec. 17, 1986), *rev'd*, No. 870252 (Va. Sup. Ct. April 22, 1988), *cert. granted*, 109 S. Ct. 1116 (U.S. February 21, 1989) (No. 88-127) 6,13,17

Graziano v. General Dynamics Corp., 663 F.2d 340 (1st Cir. 1981) 18

Harman v. Forssenius, 380 U.S. 528 (1965) 20

Harmon v. Baltimore & Ohio Railroad, 741 F.2d 1398 (D.C. Cir. 1984) 13,16

Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985) 11

Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) 14,15,19

Jackson v. Atlantic Container Corp., 15 BEN. REV. BD. SERV. (MB) 473 (Aug. 24, 1983) 14,18

Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977) 15

Levins v. Benefits Review Board, 724 F.2d 4 (1st Cir. 1984) 18

McCarthy v. Bradshaw, 564 F.2d 89 (3d Cir. 1977) 12,13

Mellon v. Purse Bros., 148 Va. 262, 138 S.E. 647 (1927) 20

Miserandino v. Sealand Service, Inc., 15 BEN. REV. BD. SERV. (MB) 111 (ALJ) (June 17, 1982) ... 14

Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978) 12

Table of Cases and Authorities Continued

Page

Nogueira v. New York, New Haven & Hartford Railroad, 281 U.S. 128 (1930) 9

Norfolk & Western Railway v. Liepelt, 444 U.S. 490 (1980) 21

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) 7-11,13,15-18,21

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979) 9,10,13,15,17,19,21

Pennsylvania Railroad v. O'Rourke, 344 U.S. 334 (1953) 9

Price v. Norfolk & Western Railway, 618 F.2d 1059 (4th Cir. 1980) 5,11,12,17,18,21

Prolerized New England Co. v. Benefits Review Board, 637 F.2d 30 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981) 14

Sabb v. Norfolk & Portsmouth Belt Line Railroad, 222 Va. 19, 278 S.E.2d 795 (1981) 20

Seaboard System Railroad v. Caldwell, Record No. 870490, *appeal granted* (Va. Sup. Ct. Mar. 22, 1988) 22

Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs, 685 F.2d 1121 (9th Cir. 1982) 13,15

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 7

Trotti & Thompson v. Crawford, 631 F.2d 1214 (5th Cir. 1980) 19

Turnista v. Chesapeake & Ohio Railway, No. 8690-WS (Newport News Cir. Ct. May 21, 1984) .. 16,17

Waller v. Eanes, 156 Va. 389, 157 S.E. 721 (1931) 20

Table of Cases and Authorities Continued

Page

Western Air Lines v. Board of Equalization, 480 U.S. 123 (1987) 19

Weyerhaeuser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976) . 15,16

White v. Newport News Shipbuilding & Dry Dock Co., 633 F.2d 1070 (4th Cir. 1980) 18

White v. Norfolk & Western Railway, 217 Va. 823, 232 S.E.2d 807, *cert. denied*, 434 U.S. 860 (1977) 5,6,9,12,14-17

Wuellet v. Scappoose Sand and Gravel Co., 18 BEN. REV. BD. SERV. (MB) 108 (Feb. 20, 1986) 14

Federal Statutes:

28 U.S.C. § 1257(3) 3

33 U.S.C. § 902 (3) 3

33 U.S.C. § 905(a) 3

33 U.S.C. § 920(a) 10

45 U.S.C. § 51 *et seq.* 3

State Statute::

Va. Code § 8.01-265 (1950) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1979

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.
NANCY J. SCHWALB,
Respondent.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.
WILLIAM MCGLONE,
Respondent.

BRIEF ON THE MERITS OF PETITIONER CHESAPEAKE AND OHIO RAILWAY COMPANY ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, Chesapeake and Ohio Railway Company,[1] respectfully prays that the judgments of the

---

[1] Pursuant to Rule 28.1 petitioner states as follows: Chesapeake and Ohio Railway Co. was merged into CSX Transportation, Inc. on Sept. 2, 1987 and the surviving corporation under the name of CSX Transportation, Inc. succeeded to the ownership of the property of the Chesapeake and Ohio Railway Co.

Supreme Court of Virginia in these two cases be reversed in accordance with the authorities relied upon herein and that judgment be entered in favor of the petitioner.

REFERENCE TO OPINIONS BELOW

The opinion of the Supreme Court of Virginia in these consolidated cases is reprinted in the joint appendix at JA: 20. The opinion is also now reported at 235 Va. 27, 365 S.E.2d 742 (further references to this decision will be to *Schwalb-McGlone*). The orders, entered March 4, 1988, are reprinted at JA: 44,45. The letter opinion of Judge Smith, Circuit Court of the City of Newport News, in *Schwalb v. Chesapeake and Ohio Railway*, is reprinted at JA: 28. The letter opinion of Judge Schlitz, Circuit Court of the City of Portsmouth, in *McGlone v. Chesapeake and Ohio Railway*, is reprinted at JA: 30.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on March 4, 1988. The jurisdiction of the Court was invoked under 28 U.S.C. § 1257(3). The Petition for a Writ of *Certiorari* was granted by this Court on February 21, 1989. 109 S. Ct. 1116.

STATUTORY PROVISIONS

These cases involve specifically the application of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 902(3) and 905(a) ("LHWCA" or "Act"). The text of these subsections is reprinted at JA: 47,48. These cases also involve the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) ("FELA"), the relevant portion of which is reprinted at JA: 49.

STATEMENT OF THE CASE

I. Factual Summary

On the James River in Newport News, Virginia the petitioner, Chesapeake and Ohio Railway Company, operates a coal loading facility at which a mechanical conveyor belt system transports coal from railroad cars to colliers berthed at the piers. Coal arrives at the Newport News facility in railroad hopper cars, which act as temporary storage containers until the cargo is loaded onto the waiting vessels. The coal loading begins when a coal car is released to roll down an incline towards a mechanical dumper. From the

---

CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation and has the following subsidiaries (except wholly - owned): Akron and Barberton Belt Railroad Company, Akron Union Passenger Depot Company, Alleghany and Western Railroad Co., Augusta and Summerville Railroad Co., Baltimore and Philadelphia Railroad Company, Beaver Street Tower Co., Belt Railway Company of Chicago, Central Florida Pipeline Corporations, Central Railroad Company of South Carolina, Central Transfer Railway and Storage Co., Chatham Terminal Co., Chicago and Western Indiana Railroad Company, Clearfield and Mahoning Railway Co., Cleveland Terminal & Valley Railroad Company, CSX Services, Inc., Dayton and Michigan Railroad Co., Dayton and Union Railroad Co., Fruit Growers Express Co., Home Avenue Railroad Co., Lakefront Dock and Railroad Terminal Company, Monogahela Railway Company, Norfolk and Portsmouth Belt Line Railroad Company, North Charleston Terminal Co., Paducah & Illinois Railroad Co., Richmond-Washington Company, RF&P Corporation, Terminal Railroad Association of St. Louis, Trailer-Train Company, Winston-Salem Southbound Railway Co., Woodstock & Blocton Railway Co.

dumper the coal falls through a hopper onto conveyor belts which carry the coal to the loading tower and onto one of two boom belts from which the coal drops through a chute into the hold of the ship. Barring mechanical problems, the coal moves continuously, propelled by ship-loading machines and gravity, from the dumper into the ship.

The dumper is attached at each end to trunnion rollers, which permit the mechanical rotation of the suspended coal car above the hopper. As cars are rotated for dumping some coal spills out into the rollers. Similarly, as the coal progresses along the conveyor belts, some coal unavoidably falls below the belts. Consequently, an essential part of the coal loading process is retrieving this stray coal, sometimes called "trash coal" by the workers, from the trunnion rollers and from the conveyor belts to avoid obstruction of the loading process. Due to the strictures of the relevant trades' bargaining agreements, the coal that is retrieved from the machinery by mechanical laborers is put back onto the conveyor belt by laborers from another department. [JA: 61-64,87-92]

Both Schwalb and McGlone worked as mechanical laborers at the Newport News facility. The primary responsibility of these workers is to keep the spilled coal from clogging the trunnion rollers or impeding the progress of the belts. [JA: 54,90] On the day of his accident, respondent McGlone reported to the dumper to remove an accumulation of coal from between the belts and the ground. [JA: 84] McGlone was injured while using an air hose to blow the coal from beneath the moving conveyor belt. On the day of her accident, respondent Schwalb was reporting to the dumper area to perform a thorough cleaning of

the trunnion rollers, since loading had just stopped. [JA: 68] Schwalb's injury resulted from a fall on the walkway between the hoppers under the dumpers. Both accidents occurred within 300 feet of the water's edge. [JA: 63,84]

Schwalb applied for and received LHWCA compensation for her injury. At the time of the June 1984 evidentiary hearing she had received in excess of $20,000.00 in LHWCA benefits. [JA: 66-67]

II. Procedural History

McGlone and Schwalb brought separate actions in the Circuit Courts for the cities of Portsmouth and Newport News respectively, seeking damages for their injuries under the FELA. Petitioner entered pleas of special jurisdiction in both actions, contending that each plaintiff's sole and exclusive remedy was under the LHWCA. After evidentiary hearings, both trial courts dismissed the FELA actions for lack of jurisdiction. The single issue decided in each case was whether the injured employee met the LHWCA status test. Acknowledging the "liberal interpretations expressed in decisions by the United States Supreme Court," Judge Smith in the *Schwalb* case had "no difficulty in determining that the plaintiff's remedy is under the LHWCA." [JA: 29] In the *McGlone* case, Judge Schlitz was particularly troubled by the conflict between the holding of the Fourth Circuit Court of Appeals in *Price v. Norfolk & Western Railway*, 618 F.2d 1059 (4th Cir. 1980), and that of an earlier state court decision, *White v. Norfolk & Western Railway*, 217 Va. 823, 232 S.E.2d 807, *cert. denied*, 434 U.S. 860 (1977). Noting that "*White* stands alone in contrast to the federal decisions . . . which have declined to follow *White* and have disagreed with its results," Judge Schlitz chose to follow the federal interpretation of federal law, which placed McGlone's action within the exclusive confines of the LHWCA. [JA: 33] McGlone and Schwalb appealed these rulings to the Supreme Court of Virginia, where the two appeals were consolidated.

The sole issue considered by the Supreme Court of Virginia on appeal was whether McGlone and Schwalb were LHWCA employees as defined by the Act. Declining the opportunity to adopt the federal courts' interpretation of the LHWCA status test and specifically rejecting the federal precedent established in *Price*, the Supreme Court of Virginia reaffirmed its 1977 *White* ruling, reversed the judgments dismissing respondents' FELA actions, and remanded the cases for trials on the merits.

A Petition for Writ of *Certiorari* was filed by the petitioner on June 2, 1988. A brief was filed in support of the petition by *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel on July 5, 1988. The Court, by order, requested that the Solicitor General express the position of the United States. On January 9, 1989, the United States filed a brief in support of the petition. On February 21, 1989 the Court granted the petition.[2]

---

[2] The Court also granted the petition for writ of *certiorari* in the companion case, *Norfolk and W. Ry. v. Goode*, 109 S. Ct. 1116 (U.S. Feb. 21, 1989) (No. 88-127). The three cases have been consolidated for oral argument in this Court. The *Goode* case is discussed *infra* at notes 7 and 11 and accompanying text.

SUMMARY OF THE ARGUMENT

Congress in the early part of this century attempted unsuccessfully to let the states provide compensation for workers who were injured on navigable waters. In 1917, the Court held that states could not constitutionally provide coverage except in rare circumstances (which became known as the "maritime but local" exception). *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). In 1927, Congress enacted the LHWCA to provide federal compensation for maritime workers not otherwise covered by compensation schemes. The original Act provided for coverage if five conditions were met: (1) employee could not be a master of vessel or a member of a crew of a vessel or a person hired by the vessel to load or unload; (2) injury must occur; (3) employer must be a "maritime employer"; (4) injury must have occurred on navigable waters (including a drydock); and (5) injury must not be compensable under a state compensation scheme. *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 306-07 (1983). The last condition proved unworkable and in 1972 Congress amended the Act and the coverage provisions.

The 1972 enactment has been consistently interpreted to require two threshold inquiries to establish LHWCA jurisdiction: situs and status. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977). The new situs definition in the 1972 Act expanded coverage to injuries that occurred landward of what had been known as the "Jensen line" (a/k/a shoreline). In these cases it is not disputed that the injury occurred on a maritime situs as defined by the Act. [JA: 28,31] To satisfy the status requirement, the worker must have been engaged in maritime employment in order to qualify for compensation under the Act.

This Court has prescribed judicial standards, consistent with the legislative intent of the 1972 amendments, for determining whether a terminal worker is engaged in maritime employment for purposes of the LHWCA. During the past decade, the lower federal courts have contributed additional insightful analysis while applying the status test in a variety of factual settings. This overwhelming body of precedent would confer LHWCA coverage on the two respondents herein. It is too late in the development of the LHWCA status test for the Supreme Court of Virginia to have misapprehended the principles approved by this Court. By denying LHWCA status to McGlone and Schwalb, injured while engaged in work that is an integral part of the coal loading process, the state court has obviously repudiated controlling federal precedent. Such unsanctioned autonomy imperils the advancement of the simple, uniform standard of coverage envisioned by Congress and warrants reversal by this Court.

ARGUMENT

I. McGLONE AND SCHWALB ARE MARITIME EMPLOYEES

Determination of a worker's status as a maritime employee within the terms of the LHWCA is controlled by principles enunciated in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). The applicability of the LHWCA is not altered by the fact that the employer is a railroad. The Court has recognized that railroad employees may be covered under the Act, and also that the FELA is inapplicable where the LHWCA provides coverage. *Nogueira v. New York, New Haven & Hartford Railroad*, 281 U.S. 128, 132 (1930); *see also Pennsylvania Railroad v. O'Rourke*, 344 U.S. 334 (1953).[3] Although Congress has seen fit to amend and change the Act numerous times in response to judicial interpretation, it has never excluded railroad employees from coverage despite a volume of case law following *Nogueira*. Therefore, the status inquiry begins with the general analysis developed in *Caputo*. In this case, the Court found that Blundo, who monitored the stripping of cargo from unloaded containers, was a maritime employee because his job was "an integral part of the unloading process." 432 U.S. at 271. By finding LHWCA coverage for Blundo, who was performing essentially clerical tasks at a shoreside loading facility, the Court emphasized that the critical question is the purpose of the work, not the type of work. The *Caputo* Court also acknowledged that the expansiveness of the 1972 amendments requires a correspondingly expansive reading of the Act by the judiciary. *Id.* at 268.

The Court reaffirmed this approach to the LHWCA status test in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). Again focusing on the nature of a worker's general job responsibilities and their relation to the shiploading process, the *Pfeiffer* Court ruled that two pier workers were maritime employees because they were "engaged in intermediate steps of moving cargo between ship and land transportation." *Id.* at 83. Observing that union rules can fragment the loading process into several distinct jobs, the Court ruled that maritime status would not be defeated because a worker functioned in only a fraction of the sequence:

---

[3] The Supreme of Virginia has conceded that railroad employees may be covered by the LHWCA. In *White v. Norfolk & W. Ry.*, relied upon by the Supreme Court of Virginia in the subject case, the court acknowledged that line tenders employed by that railway company came within the definition of "maritime employment." 217 Va. at 830, 232 S.E.2d at 811.

> A worker responsible for some portion of that [cargo moving] activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process.

Id. at 82-83. The *Pfeiffer* Court stressed that extending LHWCA coverage to all workers involved in a portion of the cargo moving process would best effectuate the congressional goal of "a simple, uniform standard of coverage." *Id.* at 83.

More recently, in *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983), the Court had an opportunity to comment on the *Caputo* and *Pfeiffer* cases. The *Perini* Court clarified that the 1972 amendments were intended to cover all workers previously covered when injured on navigable waters. 459 U.S. at 315-16. Noting it "had no occasion" to determine all the possible activities which might be covered on the "expanded landward situs," 459 U.S. at 318 n.27, the Court nevertheless acknowledged that the Act was to be "liberally construed"[4] and that the 1972 amendments were intended to "extend" coverage and protect "additional" workers. 459 U.S. at 315-16 (quoting legislative history).

---

[4] 33 U.S.C. 920(a) provides a legislative presumption that any claim under the LHWCA is within the provisions of the Act.

Although the Court has never specifically addressed the issue of whether repair and maintenance employees are covered by the Act, it has acknowledged their participation in maritime activity in *dicta*. In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), the Court refused to extend LHWCA coverage to a welder working on a fixed off-shore drilling platform.[5] 470 U.S. at 421-22. In language important to this case, the Court found that the employee's "work had nothing to do with the loading or unloading process, nor [was] there any indication that he was even employed in the maintenance of equipment used in such tasks." 470 U.S. at 425.

The Court of Appeals for the Fourth Circuit has held that an employee whose responsibilities include maintaining and repairing equipment and structures used in loading and unloading vessels is engaged in maritime employment within the terms of the LHWCA. In *Price v. Norfolk & Western Railway*, 618 F.2d 1059 (4th Cir. 1980), the court found that an employee who was injured while painting a tower supporting the conveyor belt system that transported grain to the holds of nearby vessels was a maritime employee required to seek his remedy under the LHWCA. The *Price* court's finding followed an analysis of the general nature of the plaintiff's job, as required under *Caputo*. 618 F.2d at 1060-61. To reach the conclusion that this worker was a maritime employee, the panel reasoned that:

---

[5] The case did not specifically reach the issue of status but noted that the only maritime connection was that the subject worker may have had to take a boat to get to and from his work. 470 U.S. at 427 n.13.

> (1) the equipment being maintained by the claimant was essential to the loading and unloading of vessels at the port; and
>
> (2) the maintenance and repair of longshoring machinery and equipment is as essential to the movement of maritime cargo as the actual loading and unloading of ships.

Id. at 1061.

In *Price* the Fourth Circuit expressly disagreed with and declined to follow the Virginia Supreme Court's pre-*Caputo* decision in *White v. Norfolk & Western Railway*. Instead, the *Price* court relied on its earlier decision, *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978), which held that a mechanic injured while oiling shipbuilding machinery had the status of a maritime employee. Both *Price* and *Graham* found the following language from a Benefits Review Board decision persuasive:

> Merely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. The maintenance and repair of longshoring machinery and equipment is *essential to the movement of maritime cargo* and, thus, such an employee's duties are included in the broad concept of maritime employment.

Bradshaw v. McCarthy, 3 BEN. REV. BD. SERV. (MB) 195, 198 (Jan. 26, 1976) (emphasis supplied), *petition for review denied*, 547 F.2d 1161 (3d Cir.), *vacated and remanded*, 433 U.S. 905 (1977).[6]

The Court of Appeals for the D. C. Circuit reached the same conclusion in *Harmon v. Baltimore & Ohio Railroad*, 741 F.2d 1398 (D.C. Cir. 1984), with regard to a railroad carpenter who was injured while repairing a hopper through which coal passes during the loading process. Adopting the *Pfeiffer* standard of coverage for employees "engaged in intermediate steps of moving cargo," the *Harmon* court reasoned that, since coal-loading equipment is essential to the movement of maritime cargo from railcars to ships, "the repair and maintenance of that equipment must also be considered as an integral part in the loading and unloading of ships." 741 F.2d at 1403-04.[7]

Other circuits have similarly applied the *Caputo/Pfeiffer* analysis in determining that workers who maintain or repair equipment or structures essential to loading vessels are maritime employees for LHWCA purposes. Illustrative cases include *Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121, 1123 (9th Cir. 1982) (repair and maintenance of equipment necessary to loading ships integral to process, thus "maritime employment" for LHWCA); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 755-56 (5th Cir. 1981) (maintenance and repair of longshoring equipment and facilities essential and indispensable step in shiploading process), *cert. denied*, 454 U.S. 1163 (1982); *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 370 (7th Cir. 1981) (repair and general maintenance of conveyors and other loading equipment integral part of loading process, conferring LHWCA status on worker performing these tasks); *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 37 (1st Cir. 1980) (repair and maintenance of integrated shiploading equipment qualifies as maritime employment for LHWCA), *cert. denied*, 452 U.S. 938 (1981).

---

[6] This Court remanded the case to be decided in light of *Caputo*. The subsequent decision was unpublished and a petition for review was denied in *McCarthy v. Bradshaw*, 564 F.2d 89 (3d Cir. 1977).

[7] The case of *Goode v. Norfolk & W. Ry.*, No. 870252 (Va. Sup. Ct. April 22, 1988), *cert. granted*, 109 S. Ct. 1116 (U.S Feb. 21, 1989) (No. 88-127), presented a factual situation almost identical to *Harmon* but the Virginia Supreme Court reached the opposite outcome on the status test, reversing the trial court's finding of LHWCA coverage. *See supra* note 2 and *infra* note 11 and accompanying text.

Not suprisingly, the administrative law judges and Benefits Review Boards, which administer the LHWCA and have addressed the issue, have overwhelmingly relied on and followed the federal precedent. Like the federal courts, these tribunals have paid less attention to the job title than to the essential nature of the work involved when determining LHWCA coverage. *See, e.g., Wuellet v. Scappoose Sand and Gravel Co.*, 18 BEN. REV. BD. SERV. (MB) 108 (Feb. 20, 1986) (welder/mechanic repairing conveyer belt used to load rocks onto barge); *Jackson v. Atlantic Container Corp.*, 15 BEN. REV. BD. SERV. (MB) 473 (Aug. 24, 1983) (general maintenance of terminal building containers and linkspan); *Miserandino v. Sealand Service, Inc.*, 15 Ben. REV. BD. SERV. (MB) 111 (ALJ) (June 17, 1982) (maintenance mechanic repairing containers and loading equipment).

In 1977, without the guidance of *Caputo* and *Pfeiffer*, the Supreme Court of Virginia decided that a railroad worker who maintained and repaired loading equipment at the Norfolk coal piers was "not *directly involved* in the loading of coal." *White v. Norfolk & Western Railway*, 217 Va. 823, 833, 322 S.E.2d 807, 813, *cert. denied*, 434 U.S. 860 (1977) (emphasis in original). Relying on the fact that plaintiff was "not actually handling any cargo, either manually or mechanically," *id.*, and borrowing language from *Weyerhaeuser Co. v. Gilmore* [8] and *Jacksonville Shipyards, Inc. v. Perdue*,[9] the *White* court held that the plaintiff was not a maritime employee covered by the LHWCA. 217 Va. at 833, 232 S.E.2d at 813; *see id.* (plaintiff "at least one step removed from a realistically significant relationship" and from "direct involvement" in shiploading). In the decade following *White*, not one reported court opinion has acknowledged *White* as persuasive authority. Both the Fifth and Ninth Circuits, on whose decisions the *White* court relied, have since held that workers who repair and maintain shiploading equipment are within the scope of the LHWCA. *See, e.g., Sea-Land Services, Inc.* and *Hullinghorst Industries, Inc.*. Furthermore, the *Weyerhaeuser* opinion is unsubstantial authority for analyzing the status of workers assigned to a commercial pier: the *Weyerhaeuser* plaintiff who was denied maritime status was a pondman injured while working on a sawmill log pond, not a repairman maintaining shiploading equipment beside a deep water pier. *See* 528 F.2d at 961 (pondman's work not maritime employment in traditional sense; no "realistically significant relationship" to traditional maritime activity involving navigation and commerce on navigable waters).[10] As pointed out in *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1049 (5th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), *Weyerhaeuser* formulated its "significant relationship" status test from *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), which addressed the question of federal admiralty jurisdiction in claims arising from airplane accidents over navigable waters. The *Executive Jet* holding does not speak persuasively to the intended reach of federal jurisdiction in the context of maritime employment compensation.

---

[8] 528 F.2d 957, 961 (9th Cir. 1975) ("realistically significant relationship to 'traditional maritime activity' "), *cert. denied*, 429 U.S. 868 (1976).

[9] 539 F.2d 533, 539 (5th Cir. 1976) ("directly involved"), *vacated and remanded*, 433 U.S. 904 (1977).

Given the tenuous underpinnings of *White*, and the subsequent clarification of the LHWCA status test in the federal fora, the lower courts in Virginia after careful study concluded that they were no longer bound by the pre-*Caputo* pronouncement of the state's highest court. *See, e.g.*, Letter Opinion by Judge Stephens in *Turnista v. Chesapeake & Ohio Railway*, No.

---

[10] In another case that preceded *Pfeiffer* and relied upon *Weyerhaeuser*, *Conti v. Norfolk & W. Ry.*, 566 F.2d 890 (4th Cir. 1977), the Fourth Circuit distinguished between traditional railroad tasks and traditional maritime tasks in declining to confer LHWCA jurisdiction on railroad brakemen who manually handled the rail cars destined for the dumpers at Norfolk and Western's Lambert's Point facility. This reasoning apparently has been abandoned. The D.C. Circuit noted in *Harmon v. Baltimore & O.R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984), that this analysis no longer conformed to the principles stated by this Court and that even subsequent Fourth Circuit cases have failed to follow *Conti*.

8690-WS (Newport News Cir. Ct. May 21, 1984), (reproduced in Appendix to Petition for Writ of *Certiorari*) and Letter Opinion by Judge Waters in *Goode v. Norfolk & Western Railway*.[11] Nevertheless the Supreme Court of Virginia accepted review of *Schwalb* and *McGlone* and used these cases not to overrule, not to distinguish, not even to clarify, but to reaffirm the discredited *White* decision and rationale. In its March 4, 1988 opinion,[12] the *Schwalb-McGlone* court opined that Congress did not intend the 1972 amendments to "have such pervasive and preclusive effects" as had been attributed to them by, for example, the Fourth Circuit Court of Appeals in *Price*. 235 Va. at 32, 365 S.E.2d at 744. Rejecting the *Caputo/Pfeiffer* standards that have been the linchpin of the LHWCA status test, the Supreme Court of Virginia regressed to an illogical demarcation of coverage based upon a rigid classification or labeling of skills, where it could "see no logical difference between workers 'who perform purely clerical tasks'[13] . . . and workers who perform purely maintenance tasks, such as painting" (a clear reference to *Price*), both groups being excluded from LHWCA coverage. 235 Va. at 33, 365 S.E.2d at 745 (quoting *Caputo*, 432 U.S. at 267). The court recast its status test in terms of an "essential elements" standard, which it described as "more nearly akin to the 'significant relationship' standard [it] adopted in *White* than the 'overall process' construction invoked by the defendant." *Id.* Thus clothed in confusing semantics, the *Schwalb-McGlone* court prestidigitated pierside maintenance laborers, who manually move coal during the loading process, into non-covered workers who "perform purely housekeeping and janitorial tasks." *Id.*[14] The Virginia court's approach ignores the reality that all forms of work have some skills that may be universal: a ship's carpenter may share some training and expertise with a home building carpenter; a longshoreman may employ the same physical tools as those used by a land-based loading dock employee. The critical inquiry for LHWCA coverage analysis is the purpose of the work: to build ships, not houses; to move

---

[11] Reproduced at JA: 34. The trial court's decision in *Goode* was reviewed on appeal by the Supreme Court of Virginia which, citing its rulings in *Schwalb* and *McGlone*, reversed the judgment and remanded for trial under the FELA on the merits. [JA: 46] This Court has granted a petition for a writ of *certiorari* with respect to this related action by the Virginia Supreme Court. *See supra* note 2.

[12] Reproduced at JA: 20.

[13] The court interpreted *Caputo* to exclude from LHWCA coverage all clerical workers who "are not 'engaged in the handling of cargo' " even if they have "responsibilities related to the commercial process." 235 Va. at 33, 365 S.E.2d at 745. This reveals the fallacy of the *Schwalb-McGlone* court's reasoning, since this Court has recognized that performance of clerical du-

---

ties does not preclude LHWCA coverage. Blundo, in *Caputo*, was in reality a pier clerk. *See also Levins v. Benefits Review Board*, 724 F.2d 4 (1st Cir. 1984) (improper to assume categorically clerks not entitled to coverage).

[14] This suggests a reversion to the pre-*Caputo* exclusion of "support" personnel. *Cf. Dravo Corp. v. Banks*, 567 F.2d 593 (3d Cir. 1977). Post-*Caputo* courts have refused to follow this analysis. *See, e.g., Graziano v. General Dynamics Corp.*, 663 F.2d 340 (1st Cir 1981) (maintenance mason); *Arbeeny v. McRoberts Detective Agency*, 642 F.2d 672 (2d Cir.), *cert. denied*, 454 U.S. 836 (1981) (pier guard); *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070 (4th Cir. 1980) (pipe classifier). The Benefits Review Board has also rejected this analysis. *See, e.g., Jackson v. Atlantic Container Corp.*, 15 BEN. REV. BD. SERV. (MB) 473 (Aug. 24, 1983).

maritime cargo, not truck stock. *See Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d at 756 ("non-maritime" skills applied to maritime project are maritime); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1221 n.16 (5th Cir. 1980) (longshoreman's duties, lifting and fastening, same as duties of non-maritime worker). *See also Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672 (2d Cir.), *cert. denied*, 454 U.S. 836 (1981) (pier guard whose primary function is to protect against loss of cargo "unquestionably" serving a maritime function).

Without apology, the *Schwalb-McGlone* court has ignored a decade of case law, and its decision to deny Schwalb and McGlone the status of maritime employees is untenable and must be corrected.

II. *THE SCHWALB-McGLONE* DECISION OFFENDS THE CONGRESSIONAL GOAL OF A UNIFORM STANDARD

The *Schwalb-McGlone* court, in disdaining the federal courts' uniform interpretation of the LHWCA status test, has simply ignored the congressional mandate to apply a "simple, uniform standard of coverage." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. at 83. Decisions of the United States Supreme Court are final and authoritative with respect to the construction and application of federal statutes. Absent clear words to the contrary, construction of the language in a federal statute is a federal question. *Western Air Lines v. Board of Equalization*, 480 U.S. 123, 129 (1987). A state court is not free to follow its own dictates or precedent, in the face of contrary federal authority on a federal question.[15]

---

[15] The Virginia Supreme Court has previously acknowledged the supremacy of federal law in applying other federal acts to

> [R]ecognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.

England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 415-16 (1964). *See also Harman v. Forssenius*, 380 U.S. 528 (1965). As this Court admonished in an earlier demonstration of independence by the Supreme Court of Virginia:

> [T]he vice of this position is that, in following its own prior decision, the court ignored the decision of this court to the contrary. This lawfully it could not do, the question, as we have shown, being a federal question to be determined by the application of federal law. The determination by this court of that question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding.

Chesapeake & Ohio Railway v. Martin, 283 U.S. 209, 220-221 (1931).

The brief of *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel articulately notes that when a federal action is placed within the control of state jurists there are corresponding obligations.[16] The FELA, which gives

---

actions brought in state court. *Sabb v. Norfolk & P. Belt Line R.R.*, 222 Va. 19, 278 S.E. 2d 795 (1981). *See also Waller v. Eanes*, 156 Va. 389, 157 S.E. 721 (1931); *Mellon v. Purse Bros.*, 148 Va. 262, 138 S.E. 647 (1927).

[16] Brief for the Association of American Railroads and National Association of Railroad Trial Counsel (in support of petition) at 4-6.

concurrent jurisdiction to state and federal courts, requires state courts to follow federal authorities and, in particular, to accept this Court's determination that the legislative purpose of the FELA "was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 1386, 60th Cong, 1st Sess. 3 (1908)). The grant of concurrent jurisdiction does not entitle a state court to decline to follow acknowledged federal precedent (*Price*), as the case below purports to do.

The mischief created by the aberrant state court decision under review will not be limited to the parties in these actions. The judges in Virginia's trial courts, as well as those federal administrative law judges located in Virginia, must now immediately confront the dilemma of whether to apply *Caputo*, *Pfeiffer* and their progeny, or bow to *stare decisis* and "blindly follow" the *Schwalb-McGlone* decision. *See* Opinion by Chief Judge Schlitz, at JA: 33.

An indirect consequence of the *Schwalb-McGlone* decision will be "forum shopping" by, for example, pierside railroad workers in other states, and their attorneys, who may opt to "avoid" statutory compensation under the LHWCA and instead seek unlimited tort recoveries under the FELA in a Virginia state court.[17] Due to the vagaries of Virginia's venue statute, a resident of any state can bring an action in Virginia against his or her employer doing business in the state of Virginia; the action is not vulnerable to dismissal or transfer outside Virginia even if the plaintiff and all witnesses reside in another state and the accident occurred outside Virginia. Va. Code § 8.01-265 (1950), as amended.[18] If the *Schwalb-McGlone* decision remains viable, there is little doubt that Virginia courts will soon teem with foreign FELA actions, brought by maritime plaintiffs escaping federal and state courts elsewhere that adhere to the federal standard. This is hardly the result Congress intended when it amended the LHWCA to establish a simple, uniform standard of coverage. To allow the *Schwalb-McGlone* decision to stand would frustrate the spirit and purpose of the LHWCA, create a favored class of maritime employees, and perpetuate a dichotomous approach to the Act's status test.[19]

---

[17] One inequitable factor in this ongoing controversy (at least in Virginia) is the existing federal precedent which allows a claimant to accept LHWCA benefits and later to proceed under the FELA without prejudice other than offset. *See Freeman v. Norfolk & W. Ry.*, 596 F.2d 1205 (4th Cir. 1979). In a minority

The Solicitor General in his brief in support of the petition for a writ of certiorari in this case stated:

---

opinion in *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), Judge Widener noted that under the *Freeman* rule, the employee "has the best of both worlds." 618 F.2d 1051, 1053 (Widener, J., concurring and dissenting). Respondent Schwalb had received over $20,000 in LHWCA benefits before the evidentiary hearing on her FELA claim. [JA: 66-67]

[18] The Supreme Court of Virginia has agreed to hear argument on the constitutionality of this statute. *Seaboard System R.R. v. Caldwell*, Record No. 870490, *appeal granted* (Va. Sup. Ct. Mar. 22, 1988). Argument was heard on April 19, 1989.

[19] The Association of American Railroads and National Association of Railroad Trial Counsel correctly identify in their brief numerous practical problems which this lack of uniformity would cause to both the employee and employer. *See Amici Curiae* Brief, *supra* note 16, at 8-11.

> The Virginia Supreme Court's interpretation of the LHWCA's status requirement creates a wide rift between the state court, on the one hand, and the federal courts, the Department of Labor, and the BRB, on the other. . . . The decision invites forum shopping among injured workers, including many who reside out-of-state. Workers with potentially strong FELA claims will opt for state court actions, while those confronted with the choice between inadequate or uncertain state remedies and LHWCA benefits will sue in federal court. The result plainly frustrates Congress's intent that a single uniform standard of coverage apply to LHWCA claims.

Brief for the United States As *Amicus Curiae* (in support of petition) at 18.

CONCLUSION

For the above reasons, petitioner Chesapeake & Ohio Railway Company respectfully submits that the judgments of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

William T. Prince
Counsel of Record
Edward L. Oast, Jr.
John Y. Richardson, Jr.
Joan F. Martin
Williams, Worrell, Kelly,
Greer & Frank, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510
804-624-2600

Attorneys for Petitioner
Chesapeake & Ohio
Railway Company

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
MAY 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 87-1979

In The

Supreme Court of the United States

October Term, 1988

◆

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.

NANCY J. SCHWALB,
Respondent.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.

WILLIAM McGLONE,
Respondent.

◆

BRIEF ON THE MERITS OF RESPONDENTS NANCY J. SCHWALB AND WILLIAM McGLONE ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

◆

C. GERARD THOMPSON
Counsel of Record
MOODY, STROPLE & KLOEPPEL, LTD.
Commerce Bank Building
Suite 300
500 Crawford Street
Portsmouth, Virginia 23704
(804) 393-4093

23pp

QUESTIONS PRESENTED

I. Is an unskilled railroad laborer who sweeps coal from coal piers and does not perform traditional longshoring activities a "maritime employee" under the Longshore and Harbor Workers' Compensation Act?

II. Will the extension of the Longshore and Harbor Workers' Compensation Act to the respondents promote the legislative concerns of Congress that prompted the 1972 Amendments?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Cases and Authorities iii

Statement of the Case 2

Statement of Facts 2

Argument

I. RESPONDENTS ARE RAILROAD WORKERS, WHO DO NOT LOAD OR UNLOAD CARGO OR PERFORM TRADITIONAL LONGSHORING ACTIVITIES, AND, AS SUCH, ARE NOT MARITIME EMPLOYEES UNDER LHWCA 3

II. THE EXTENSION OF LHWCA BENEFITS TO RESPONDENTS DOES NOT ADVANCE THE CONGRESSIONAL PURPOSES, NOR IS IT CONSISTENT WITH THE STATED OBJECTIVES OF THE 1972 AMENDMENTS.................... 11

Conclusion 17

TABLE OF CASES AND AUTHORITIES

Page

Cases:

Director, Office of Worker's Compensation Programs, United States Department of Labor v. Perini North River Associates, 459 U.S. 297 (1983) 8, 9, 11, 14, 18

Dorris v. Director, Office of Worker's Compensation Programs, 808 F.2d 1362 (9th Cir. 1987) ...15, 16

Dravo Corp. v. Banks, 567 F.2d 593 (3rd Cir. 1977) 15

Herb's Welding, Inc. v Gray, 470 U.S. 414 (1985) 9, 11, 14, 16, 18

Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969) 4, 8, 11

Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) .... *passim*

P. C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 (1979) *passim*

Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980) 7, 14, 17

Weyerhaeuser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976) 15

Wilkerson v. McCarthy, 366 U.S. 53 (1949)............ 4

Statutes:

Federal Employers' Liability Act, 45 U.S.C. § 51 2

Jones Act, 46 U.S.C. § 688 17

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3) 5, 7

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 903(a) 5, 6

TABLE OF CASES AND AUTHORITIES – Continued

Page

MISCELLANEOUS:

U.S. Senate Committee on Labor and Public Welfare, 92nd Cong., Senate Bill 1547 17

U.S. Senate, Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92nd Congress, 2nd Session, Senate Bills 2318, 525 and 1547 13

In The

Supreme Court of the United States

October Term, 1988

◆

No. 87-1979

◆

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.
NANCY J. SCHWALB,
Respondent.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.
WILLIAM McGLONE,
Respondent.

◆

BRIEF ON THE MERITS OF RESPONDENTS NANCY J. SCHWALB AND WILLIAM McGLONE ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

◆

Respondents, Nancy Schwalb and William McGlone, respectfully prays that the judgments of the Supreme Court of Virginia be affirmed and that the cases be remanded for trial on their merits.

STATEMENT OF THE CASE

Nancy Schwalb and William C. McGlone filed suit under the Federal Employer's Liability Act, 45 U.S.C. § 51 against Chesapeake and Ohio Railway Company in the Circuit Court of the City of Newport News and Circuit Court of the City of Portsmouth for injuries sustained on January 11 and February 1, 1983, respectively. The Railroad filed special pleas to the jurisdiction of the Circuit Courts which the presiding Judges sustained. The employees perfected their appeals to the Supreme Court of Virginia. On March 4, 1988, the Supreme Court of Virginia, in a unanimous opinion, reversed the Circuit Court Judges and remanded the cases for trial. *Schwalb and McGlone v. Chesapeake and Ohio Railway Co.*, 235 Va. 27 (1988).

The Railroad petitioned this Court for a writ of certiorari, and this Court granted the writ of certiorari to the judgments of the Supreme Court of Virginia.

◆

STATEMENT OF FACTS

On January 11, 1983, Nancy Schwalb, a laborer and member of the International Brotherhood of Firemen and Oilers, was injured on Pier 14 at Newport News, Virginia. The coal pier had been shut down, and she was walking to the trunnion rollers to perform a thorough cleaning. (JA:68). She fell on a metal walkway, striking her head. A fellow laborer, Ben Gathers, found her on the walkway between 1:30 a.m. and 2:00 a.m. on January 12. Schwalb was bleeding from the nose and ear and has suffered seizures since the accident. She is unable to return to her railroad employment.

William C. McGlone, a laborer with Chesapeake and Ohio Railway Company since 1970, injured his right arm during cleanup efforts on the defendant's property in Newport News, Virginia. On February 1, 1983, McGlone's supervisor, Robert Layne, directed him to clean the area below main conveyor belt number three. McGlone requested the belt be shut down, but Layne rejected his request and instructed him to clean the debris from the concrete pier below the moving conveyor belt. McGlone complied with the order and proceeded to clean the debris. A defective belt on the conveyor system caught his right arm and nearly severed it. He sustained a 60% loss of use of the right arm and is permanently disabled from railroad employment.

◆

ARGUMENT

I. RESPONDENTS ARE RAILROAD WORKERS, WHO DO NOT LOAD OR UNLOAD CARGO OR PERFORM TRADITIONAL LONGSHORING ACTIVITIES, AND, AS SUCH, ARE NOT MARITIME EMPLOYEES UNDER LHWCA.

The respondents who live and worked in the Tidewater area brought separate actions in Newport News and Portsmouth, Virginia, to recover for railroad related personal injuries. As other employees have for 80 years, the respondents invoked the Federal Employers' Liability Act (FELA). The FELA has been specially enacted for railroad workers "to put on the railroad industry some of the cost for legs, eyes, arms and lives which it consumes in its operations". *Wilkerson v. McCarthy*, 366 U.S. 53 at 68 (1949). Remedial in nature, the Courts have liberally interpreted and applied the FELA for the benefit of railroad employees.

Before 1972, coverage under Longshoremen's and Harbor Workers' Compensation Act[1] (LHWCA) was limited to employees injured upon the navigable waterways of the United States. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). In essence, a one-part or situs test determined the availability of federal compensation under LHWCA. Longshoremen received federal benefits only if their injuries occurred upon the navigable waterways.

In *Nacirema*, this Court denied LHWCA compensation to three workers who were attaching cargo from railroad cars to ships' cranes for loading onto a vessel. When a loaded crane swung back towards land, four men were injured. The Court of Appeals had found that all four men should be compensated under LHWCA. The employer appealed the award of benefits to three of the four men. No petition for certiorari was sought in the case involving the worker who fell in the water. Although one of the three men died, this Court denied compensation because they were killed or injured on a pier rather than upon the navigable waterways.

Congress responded with the 1972 amendments to the LHWCA. It replaced the previous situs test with a two-prong test. The prongs included: 1) a situs requirement and 2) a status requirement. The situs language

---

[1] In 1984, Congress amended the Act and changed its name to Longshore and Harbor Workers' Compensation Act.

greatly expanded the scope or geographical limits of the LHWCA, but the status language imposed a new limitation upon workers. Under the status test, a person must be engaged in "maritime employment" to receive federal compensation benefits.

Section 903(a) states where a longshoreman's claim must occur. It states:

> except as otherwise provided in this section, compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel). 33 U.S.C. § 903(a).

Section 902(3) of the Act defines the status test which an employee must occupy before the LHWCA applies. It states:

> the term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harbor worker including the ship repairman, shipbuilder and shipbreaker . . . 33 U.S.C. § 902(3).

In *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), this Court extended coverage to Ralph Caputo, a member of the regular longshoring gang, and Carmelo Blundo, a checker in Brooklyn, New York. Caputo worked as a terminal laborer and normally loaded or unloaded containers, barges and trucks. He was injured while rolling a dolly loaded with cheese into a consignee's truck. Blundo, as a checker, was responsible for checking and recording cargo as it was unloaded onto or from vessels, barges or containers. He slipped on some ice on the pier while marking containerized cargo.

Under pre-1972 law, both employees would not have received compensation under the LHWCA, but, under the 1972 amendments, they did. The Court stated:

> The 1972 amendments were the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it. The main concern of the 1972 amendments was not with the scope of coverage but with accommodating the desires of three interested groups: (1) Shipowners who were discontented with the decisions allowing many maritime workers to use the doctrine of 'seaworthiness' to recover full damages from shipowners regardless of fault; (2) Employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) Workers who wanted to improve the benefit schedule deemed inadequate by all parties. *Id.* at 261.

Congress sought to meet these desires through the 1972 amendments. Congress broadened the definition of "navigable waters of the United States" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel". 33 U.S.C. § 903(a).

Congress simultaneously amended the definition of the person covered by the Act and added the requirement that an injured worker be "engaged in maritime employment" which it defined to include "any longshoreman or any other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder and shipbreaker . . . .". 33 U.S.C. § 902(3). Though Caputo and Blundo were not upon the navigable waterways when injured, they clearly fit the expanded situs definition and were engaged in the handling of cargo. Consequently, they were entitled to compensation.

In *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979), this Court affirmed longshoremen's benefits for Diverson Ford, a warehouseman, and William Bryant, a cotton header. Although neither was injured upon the navigable waterway as defined before the 1972 amendments, both were "engaged in the type of duties that longshoremen perform in transferring goods between ship and land transportation". *Id.* at 81. This Court concluded the explicit use of the terms "longshoremen" and "other persons engaged in longshoring operations" demonstrated that "workers doing tasks traditionally performed by longshoremen were within the purview of the 1972 Act". *Id.* at 82.

This Court in *P. C. Pfeiffer Co.* acknowledged one of the reasons Congress expanded coverage in 1972. The advent and proliferation of containerization had shifted much of the loading and unloading tasks from aboard ship to land. To deny access to the LHWCA because a worker fortuitously sustained injuries on piers or other land based structures rather than water would severely and unfairly limit compensation for traditional longshoremen's work.

In *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), this Court allowed employees to apply for and recover from their state workmen's compensation scheme *and* the federal workmen's compensation scheme. The 1972 amendments to the LHWCA deleted a previous requirement in which recovery was dependent upon the unavailability of compensation by state law. The deletion of this requirement evidenced the concurrent nature and jurisdiction of federal and state compensation laws.

The Court concluded "if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for worker's injuries than under an exclusively federal compensation system". *Id.* at 724. Congress was not concerned with the disparity between adequate federal benefits and superior state benefits. Rather, the *quid pro quo* to the employers for the landward extension of the LHWCA by the 1972 amendments was the abolition of the longshoremen's unseaworthiness remedies. Interestingly, Congressional Reports dwell upon the rejection of the unseaworthiness action and do not mention the pre-emption of state remedies. *Id.* at 24 and 25. Similarly, Congress did not mention pre-emption of the FELA or the application of the LHWCA to railroad workers during the deliberation on the 1972 Amendments.

In *Director, Office of Worker's Compensation Programs, United States Department of Labor v. Perini North River Associates*, 459 U.S. 297 (1983), the Supreme Court allowed Raymond Churchill, an employee of Perini, to receive benefits under the LHWCA. Churchill was injured while working a barge in navigable waters. This Court again reviewed the historical events preceding the 1972 amendments. It specifically stated Congress responded to its decision in *Nacirema* in which the Court held the LHWCA did not extend to longshoremen whose injuries occurred on a pier attached to land.

The Congressional Record during the debate on the 1972 amendments was also reviewed, and the Court enumerated the purposes of the 1972 amendments. They were: (1) To raise the amount of compensation available under the LHWCA, (2) To extend coverage of the Act to include certain contiguous land areas, (3) To eliminate the longshoremen's strict liability seaworthiness remedy against shipowners, (4) To eliminate shipowner's claims for indemnification from stevedores, and (5) To promulgate certain administrative reforms. *Perini* at 313.

In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), this Court reversed the United States Court of Appeals for the Fifth Circuit and denied LHWCA coverage to Robert Gray, a welder. Gray worked for Herb's Welding, Inc., off the Louisiana coast. While welding a gas flow line on a fixed platform located in Louisiana waters, he burned through the bottom of a line, and an explosion resulted. He injured his knees and sought benefits under the LHWCA for wages, disability and medical expenses. The Fifth Circuit granted compensation, concluding that offshore drilling is maritime commerce and anyone performing such tasks was employed in maritime employment for LHWCA purposes.

In rejecting the Fifth Circuit's expansive view of maritime employment, this Court stated "Congress did not seek to cover all those who breathe salt air". *Id.* at 423. Rather, Congress' purpose was to cover those workers engaged in traditional maritime employment. "The amendments were not meant 'to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.' " *Id.* at 424.

Respondents Schwalb and McGlone, contrary to the appellant's statements, did not load or unload cargo or repair equipment. The Railroad's initial witness in the Schwalb hearing, M. L. Overman, stated that Schwalb's primary duties were "clean(ing) spilled coal from under the belts, trunnion rollers and off of the loading towers". (JA:54). On cross-examination, he acknowledged that she swept floors in the office, yard and other areas. (JA:57). He described her job as a laborer, an unskilled job. (JA:57). She did not load coal, operate the loading machinery and equipment or go aboard ship. (JA:57 and 58). Schwalb indicated her duties included clearing the coal from the tower and the dumper for an hour or two each shift, cleaning and sweeping locker rooms and sweeping the office, oil house and lunch area. (JA:68 and 69). She never loaded coal or went aboard ship. (JA:70). Furthermore, she belonged to the International Brotherhood of Firemen and Oilers, a railroad union. (JA:70). Similarily, McGlone never loaded coal, operated loading equipment or went aboard ship. (JA:98 and 99). His job as a laborer with the C & O Railway included cleaning up trash coal[2], bathrooms, bunkhouses, and other railroad property. (JA:98 and 99).

---

[2] Trash coal is the term for spilled coal or spillage. See JA-90.

The respondents are not maritime employees. They do not load or unload cargo and do not engage in tasks traditionally performed by longshoremen. While the appellant railroad would castigate the status requirement and apply LHWCA to all those who breathe salt air, LHWCA benefits should not be extended to those employees who are not actually involved in loading or unloading cargo between ship and land transportation or performing tasks traditionally performed by longshoremen. *Herb's Welding, Inc.* at 424. To classify the respondents' employment as maritime because they were injured in a covered situs, would eliminate the status requirement of the 1972 Amendment.[3]

II. THE EXTENSION OF LHWCA BENEFITS TO RESPONDENTS DOES NOT ADVANCE THE CONGRESSIONAL PURPOSES, NOR IS IT CONSISTENT WITH THE STATED OBJECTIVES OF THE 1972 AMENDMENTS.

Congress did not intend to extend LHWCA benefits to all those who breathe salt air. Rather, Congress intended to cover those workers who had been previously covered and those, who without the 1972 Amendments, would be covered for only part of their activity. *Perini* at 323-324 and *Caputo* at 273.

Before 1972, the LHWCA had numerous shortcomings. First, coverage depended upon the fortuitous location of the accident. For example, in *Nacirema*, three of four men were denied coverage because of where they were injured or where they fell. The fourth received compensation because he fell upon the navigable water. Second, the state workmen's compensation laws for those men who were not covered under the pre-1972 LHWCA were inadequate. Third, the longshoreman's employer often indemnified shipowners and thereby lost the benefit of the intended exclusivity of the compensation remedy.

---

[3] This Court has used the phrase "traditionally performed by longshoremen" in *P. C. Pfeiffer Co.* at 82 and *Herb's Welding, Inc.* at 425.

Interested parties, such as, the Secretary of Labor, International Longshoremen's Association, admiralty lawyers and other interested maritime representatives, testified before Congress. The Honorable James D. Hodgson, Secretary of Labor, testified before the Senate Subcommittee on Labor. He stated the amendments concentrated on two major issues, the level of compensation benefits and the problem of circular liability suits. The circular liability suits involved injured longshoremen, not railroad workers. Thomas W. Gleason, President of International Longshoremen's Association, argued against the elimination of third party suits. He felt compensation for only a portion of lost wages would not make an injured worker whole. Rather, third party suits would offer a chance of complete regress. The Honorable Philip Burton, Dennis Lindsay, Captain John H. Anthony, Fred R. Smith and Emmet J. Pierce[4] appeared before the Subcommittee on Labor of the Committee on Labor and Public Welfare in San Francisco, California. Their comments, like others, were directed at the amount of state workmen's compensation benefits and the circular liability suits, not FELA actions by a railroad employee against his employer. See, Hearings before the Subcommittee on Labor of Committee on Labor and Public Welfare of the United States Senate.[5]

Throughout the hearings, representatives of longshoremen's unions, shipping companies and stevedoring companies testified. Representatives for the railroad labor unions and railroad corporations did not appear or testify about the effect of the 1972 amendments on railroad employees or FELA. Congress' response to the vacillating and inadequate conversation and the circular liability suits was the 1972 Amendments. They addressed the three principal groups: 1) shipowners who were discontented with the decisions allowing many maritime workers to use the doctrine of 'seaworthiness' to recover full damages from shipowners regardless of fault, 2) longshoremen's employers who, under another judicially created doctrine, were required to indemnify shipowners and thereby lost the benefit of the intended exclusivity of compensation remedy and 3) workers who wanted to improve the benefit schedule deemed inadequate by all parties. *Caputo* at 262.

The application of the LHWCA to the respondents, Schwalb and McGlone, does not address any of these concerns. No shipowner is interested in the respondent's

---

[4] The Honorable Phillip Burton represented the Fifth Congressional District in California. Dennis Lindsay represented the West Coast Stevedore Association and the National Maritime Compensation Committee. Captain Anthony was the President of Metropolitan Stevedore Co. Fred Smith was Chairman of the Board for Seattle Stevedore Co. and Southeast Stevedoring Corp. Emmet Pierce was Vice President of Operations for the Marine Terminals Corp. They testified before the Subcommittee on Labor of the Committee on Labor and Public Welfare on June 5, 1972, in San Francisco, California.

[5] Donald Elisburg appeared as an associate counsel for the Subcommittee. He also appeared with trial counsel before the Honorable Lester Schlitz and discussed the Congressional intent and the 1972 Amendments. See, Trial Transcript at 99-107.

action against the C & O Railway Company. Nor could the employer of the respondents, C & O Railway Company, be required to indemnify a shipowner. Nor was the appellant, C & O Railway Company, the intended beneficiary of the exclusivity of the compensation laws. Nor do the respondents argue or suggest that the benefit schedule under the FELA is inadequate or inferior to the LHWCA.[6]

Not all employees who breathe salt air are covered under the LHWCA. Rather, Congress intended some nexus with maritime employment. "Employees who are not engaged in loading, unloading, repairing or building a vessel" are not covered by LHWCA "because they are injured in an area adjoining navigable waters used from such activity". *Herb's Welding, Inc.* at 424. *Caputo* and *P. C. P. C. Pfeiffer Co.* involved employees who actually unloaded or disassembled containerized cargo. *Perini* simply states that the amendments did not reduce or constrict prior coverage. *Sun Ship* permits the injured longshoreman to recover more generous state compensation benefits, if available. To classify the respondent's employment as maritime because they were injured on a pier, a post-1972 situs, would obliterate the congressional intent and purposes.

Other courts have acknowledged the status limitation and the congressional intent and purposes. The Third Circuit recognized the status requirement and the congressional intent in *Dravo Corp. v. Banks*, 567 F.2d 953 (1977). In *Banks*, the employer appealed an order of the Benefits Review Board which afforded Gregory Winston Bank, a laborer, coverage under the LHWCA. Banks performed plant maintenance, such as, cleaning up debris. He was injured on a walkway while lifting a bag of salt, which he intended to spread on the walkways and steps. The Third Circuit reviewed this Court's decision in *Caputo* and determined Banks was a clerical worker who fell outside of Congress' concern for employees who actually handle cargo. The Court did not find the close functional nexus between the individual's job and longshoring or shipbuilding. Consequently, it reversed the Benefits Review Board and denied LHWCA coverage to Banks.[7]

In *Dorris v. Director, Officer of Worker's Compensations Programs*, 808 F.2d 1362 (9th Cir. 1987), the Ninth Circuit Court of Appeals reviewed the decision of the Benefits Review Board to deny LHWCA benefits to Otto Dorris, a truck driver. The Ninth Circuit reviewed this Court's decision in *Caputo* and *P. C. Pfeiffer Co.* and its own decision in *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 956 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976). It concluded "the status requirement is satisfied where a person spends 'at least some of its time in indisputably longshoring operations' ". *Dorris* at 1364 (citing *Caputo* at 273). The Court concluded, "neither the driver of the truck carrying cotton . . . nor the locomotive engineer transporting military vehicles . . . was engaged in martime employment' ", *Id.* at 1364 (citing *P. C. Pfeiffer Co.* at 83). Although compelled to give effect to the remedial purpose of the Act, the Ninth Circuit " 'eliminate(d) the gray areas of jurisdiction under the . . . statute and place(d) a clear line of demarkation between those employees entitled to the benefits of federal compensation and those entitled to recover under state law' ". *Dorris* at 1365.[8]

---

[6] Although the appellant revels in the amount of compensation that Nancy Schwalb earned before the evidentiary hearing in the Circuit Court of the City of Newport News, the FELA would not limit the respondents' recovery to two-thirds of their average weekly wage for a limited number of weeks. Under FELA, Railroad employees may receive sickness benefits from the Railroad Retirement Board and that the Railroad pays their medical expenses through Travelers Insurance Company. The sick benefits, as well as the LHWCA benefits, would be deducted from any subsequent FELA recovery.

[7] *Dravo* was decided after *Caputo*. See, Brief on the merits of petitioner at 18, n. 14.

The appellant seeks to reduce or eliminate the railroad employee's traditional right and remedy under FELA through the application of LHWCA to the respondents. In 1982, McGlone sustained a temporary injury while blowing trash coal from underneath a conveyor belt with a high pressure hose. Although he was closer to the water in his 1982 injury and performing the same job, he recovered $2,000.00 from the Railroad pursuant to FELA for his 1982 injury. (JA:100-103 and 114-115). After the passage of one year and the current permanent injury, respondent McGlone according to the appellant has been converted into a longshoreman and should be limited to LHWCA.

In *Herb's Welding, Inc.*, this Court noted with more than passing interest the respondent, Robert H. Gray, had

superior benefits, if he could qualify as a seaman under the Jones Act or general maritime law. Specifically, Senate Bill 1547, which was introduced to increase the benefits of offshore oil workers, was rejected because it would limit the recoveries of offshore oil workers who did better without LHWCA coverage. If a stated purpose of the 1972 Amendments was the improvement of benefits for longshoremen and one of the reasons for denying LHWCA coverage to Gray was the superior benefits, why should the respondents be limited to the temporary and limited compensation under LHWCA? What Congress did not intend or legislate, the appellant seeks to impose upon the respondents through judicial intervention.

◆

CONCLUSION

Respondents are employees of Chesapeake and Ohio Railway Company. As railroad employees, they performed janitorial service in cleaning the bathrooms, bunkhouses, cabooses, engines and piers. They did not and have never performed traditional longshoremen's or maritime duties, nor have they loaded or unloaded cargo. To extend LHWCA coverage to the respondents would deny them a superior remedy under the FELA, would allow the Railroad to settle small claims under the FELA but minimize their losses on larger claims through the application of the LHWCA, would defeat the specific purposes of the 1972 amendments and would violate the principles and findings in *Caputo, P. C. Pfeiffer Co., Sun*

---

[8] Contrary to the Brief of the United States Amicus Curiae, the Ninth Circuit has not abandoned its reliance upon "realistically significant relationship to traditional longshoring operations". See, Brief of the United States Amicus Curiae at 25, n. 24.

Ship, Perini and *Herb's Welding, Inc.* Respondent respectfully requests the judgments of the Supreme Court of Virginia be affirmed, and the cases be remanded for trial.

Respectfully submitted,

C. GERARD THOMPSON
Counsel of Record

C. GERARD THOMPSON
MOODY, STROPLE & KLOEPPEL, LTD.
P.O. Box 1138
Portsmouth, Virginia 23705-1138

REPLY
BRIEF

9 9

Supreme Court, U.S.
FILED
JUN 23 1989
[illegible]. SPANIOL, JR.
CLERK

Nos. 87-1979 and 88-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.
NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,
v.
ROBERT T. GOODE, JR.,
Respondent.

PETITIONERS' REPLY BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

WILLIAM T. PRINCE*
EDWARD L. OAST, JR.**
JOHN Y. RICHARDSON, JR.
JOAN F. MARTIN
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510
804-624-2600
Attorneys for Petitioners

**Counsel of Record*
In No. 87-1979
***Counsel of Record*
In No. 88-127

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CASES AND AUTHORITIES	ii
ARGUMENT	1
I. The LHWCA Extends to Railroad Workers Who Are Engaged in Maritime Employment	2
II. The LHWCA Extends to All Workers Who Directly Further Longshoring Operations	9
CONCLUSION	17

TABLE OF CASES AND AUTHORITIES

Cases: Page

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 4

Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) 4

Dravo Corp. v. Banks, 567 F.2d 593 (3d Cir. 1977) 12

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) 9

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974) 3

Harmon v. Baltimore & O.R.R., 560 F. Supp. 914 (1983), *aff'd*, 741 F.2d 1398 (D.C. Cir. 1984) . 5

Lorillard v. Pons, 434 U.S. 575 (1978) 6

Nogueira v. New York, N.H. & H.R.R., 281 U.S. 128 (1930) 3,4

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) 8,9,17

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979) 9,11,13,14

Pennsylvania R.R. v. O'Rourke, 344 U.S. 334 (1953) 4

Price v. Norfolk & W. Ry., 618 F.2d 1059 (4th Cir. 1980) 4,5

62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593 (1951) 10

Stewart v. Brown & Root, Inc., 7 BEN. REV. BD. SERV. (MB) 356 (Jan. 12, 1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087 (4th Cir. 1979), *cert. denied*, 446 U.S. 1087 (1980) 10,11

Suppa v. Lehigh Valley R.R., 13 BEN. REV. BD. SERV. (MB) 374 (March 31, 1981) 5

Table of Cases and Authorities Continued

Page

United States v. Great N. Ry., 343 U.S. 562 (1952) 6

Vogelsang v. W. Maryland Ry., 670 F.2d 1347 (4th Cir. 1982) 4

Statutes:

Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 2,7,8,16

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* .... *passim*

  § 2(3), 33 U.S.C. § 902(3) (Supp. IV 1986) 4,5,9,11,15,17

  § 2(3), 33 U.S.C. § 902(3) (1982) 4

  § 3(a), 33 U.S.C. § 903(a) 13

  § 5, 33 U.S.C. § 905 (1982 and Supp. IV 1986) 3

Longshore and Harbor Workers' Compensation Act Amendments of 1984, 98 Stat. 1654 3,5,6

Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251 3,4,6,9,14

Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, § 3, 44 Stat. 1426 3,4

Miscellaneous:

127 Cong. Rec. 9829 (1981) 5

130 Cong. Rec. (1984):

  p. 25,902 6

  p. 25,903 15

4 A. Larson, *Larson's Workmen's Compensation Law* (1989) 8

Table of Cases and Authorities Continued

Page

S. Rep. No. 498, 97th Cong., 2d Sess. (1982) 5

S. Rep. No. 1125, 92d Cong., 2d Sess. (1972) 8

S. 462 Amendment (proposed by Sen. Kasten), 101st Cong., 1st Sess. (1989) 8

Webster's *New World Dictionary of the American Language* (2d College ed.) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1979

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.
NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

No. 88-127

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,
v.
ROBERT T. GOODE, JR.,
Respondent.

PETITIONERS' REPLY BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners Chesapeake and Ohio Railway Company and Norfolk and Western Railway Company[1] jointly submit this brief in reply to the respondents' briefs on the merits in these consolidated cases.

---

[1] Pursuant to Rule 28.1 Petitioners state that the prior listings of corporate affiliates in their Briefs on the Merits are currently accurate.

ARGUMENT

Respondents Schwalb, McGlone, and Goode want to rewrite the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, to exclude:

(1) all pierside workers who are employed by railroads; and

(2) all pierside workers who directly further longshoring operations without actually loading cargo.

In other words, respondents want to rewrite the LHWCA to include restrictions never contemplated by its authors. Respondents' formulation of the LHWCA status requirement, like that of the Virginia Supreme Court, has no basis in either the actual language or the legislative history of the Act and is inconsistent with decades of judicial and administrative decisions. This Court should confirm the initial determinations in these cases that the LHWCA extends to railroad workers engaged in maritime employment whose daily work ensures the ongoing productiveness of shiploading equipment.

I. The LHWCA Extends to Railroad Workers Who Are Engaged in Maritime Employment

Since 1908, the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, has provided a mechanism for the recovery of tort damages by railroad employees injured in the course of railroad employment. However, beginning with the adoption of the LHWCA in 1927, railroad workers injured in maritime employment have been compensated under the LHWCA. The LHWCA expressly provides that an

employer's liability for any injury to a covered employee is exclusive and supplants any other basis for liability. 33 U.S.C. § 905 (1982 and Supp. IV 1986). Although the Act expressly excludes some categories of workers found on or near maritime locations,[2] the LHWCA has never excluded railroad workers as a class from its coverage. In 1928, Congress enacted legislation adopting the LHWCA to compensate workers' injuries in the District of Columbia; railroad workers *were* expressly excluded from the coverage of the District of Columbia Workers' Compensation Law.[3] This statutory history leads to the inescapable conclusion that Congress was aware that the LHWCA applied to railroad workers and that Congress deliberately included railroad workers outside the District of Columbia within the LHWCA's coverage.

---

[2] For example, Congress specifically excluded seamen from LHWCA coverage under the 1927 Act and retained this exclusion in the 1972 and 1984 Amendments, presumably in response to the stated preference of seamen to be compensated under the Jones Act. An exception for railroad employees was considered but dropped from the legislation prior to passage of the LHWCA in 1927. *See Nogueira v. New York, N.H. & H.R.R.*, 281 U.S. 128, 136 (1930). The deletion of a provision prior to the adoption of a statute "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

[3] Respondent Goode argues that the exclusion of railroad workers from the District of Columbia Workers' Compensation Law should be construed to graft this exclusion onto all federal compensation acts. *See* Goode Brief on the Merits at 10 n.2. To paraphrase the *Nogueira* opinion, "the fact that a similar exception was left out of the Longshoremen's and Harbor Workers' Compensation Act and was inserted in the later statute works against, rather than for, [Goode's] contention." 281 U.S. at 138.

Nothing in the plain language of the original LHWCA or any of its amendments even hints at a "railroad worker" exception to the exclusive coverage of the Act. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). By contrast, the LHWCA amendments have added specific exceptions for certain categories of workers. *See, e.g.*, 33 U.S.C. § 902(3) (1982) (exceptions for masters and members of crew of any vessel and persons engaged to load, unload, or repair small vessels); 33 U.S.C. § 902(3) (Supp. IV 1986) (additional exceptions for, *inter alia*, marina employees, restaurant employees, and clerks working exclusively in offices). Where Congress explicitly enumerates specific exceptions to coverage, "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 617 (1980).

Since the passage of the original Act in 1927 and also after the 1972 LHWCA amendment added the new "status" test set forth in Section 2(3), numerous judicial and administrative decisions have confirmed LHWCA coverage for railroad workers. *See, e.g.*, *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953); *Nogueira v. New York, N.H. & H.R.R.*, 281 U.S. 128 (1930); *Vogelsang v. W. Maryland Ry.*, 670 F.2d 1347 (4th Cir. 1982) (LHWCA exclusive remedy for railroad employee injured while adjusting lids on railcars through which coal flowed since engaged in integral part of loading process); *Price v. Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980) (LHWCA exclusive remedy for railroad employee injured while painting

loading tower since engaged in maintaining equipment essential to loading process); *Harmon v. Baltimore & O.R.R.*, 560 F. Supp. 914 (1983) (LHWCA exclusive remedy for railroad employee injured while repairing coal loading equipment), *aff'd*, 741 F.2d 1398 (D.C. Cir. 1984); *Suppa v. Lehigh Valley R.R.*, 13 BEN. REV. BD. SERV. (MB) 374 (March 31, 1981) (railroad worker injured in loading process entitled to benefits under LHWCA). Presumably aware that railroad workers were consistently considered within the scope of the Act, Congress in 1984 again amended the LHWCA without any indication that this construction of the Act was contrary to its intent.[4] When Congress amends a statute with a long history of consistent judicial and administrative interpretation, the retained portions of the act are presumed to incorporate that interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

---

[4] In fact, in an effort to clarify the definition of "maritime employee" to exclude some peripheral workers not intended to receive LHWCA benefits, Congress provided an express exclusion for workers employed by transporters who "are temporarily doing business on the premises of [a maritime] employer . . . and [who] are not engaged in work normally performed by employees of that employer under this chapter." 33 U.S.C. § 902(3)(D) (Supp. IV 1986). The fact that Congress carved out an exception to coverage for transportation workers, but further limited the exception as quoted above, indicates that transportation workers who *are* regularly on the premises performing the normal work of their employer are intended to remain within the scope of the Act. It is significant that § 902(3)(D) is all that remains of a proposed exclusion for persons engaged in railcar or mechanical truck loading or unloading considered in in connection with LHWCA Amendments proposed in 1981. *See* 127 Cong. Rec. 9829 (1981). The proposed 1981 exclusion was never reported out of the Committee. *See* S. Rep. No. 498, 97th Cong., 2d Sess. (1982).

Respondents Schwalb and McGlone protest that Congress failed to announce during the legislative process culminating in the 1972 LHWCA Amendment that the LHWCA was intended to pre-empt the FELA. *See* Schwalb/McGlone Brief on Merits at 8. Respondent Goode states that this omission from the legislative history of the 1972 and 1984 amendments "indicates that there was no intention to effect [sic] the rights of railroad workers such as Robert Goode."[5] *See* Goode Brief on Merits at 8. But it is foolhardy to divine legislative intention from legislative omission: the judicial function is "to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry.*, 343 U.S. 562, 575 (1952).[6]

Respondents argue that the intent of Congress should be inferred from the failure of the railroad industry to testify at hearings on the LHWCA Amendment. *See* Schwalb/McGlone Brief on Merits at

---

[5] Petitioners agree that Congress showed no intention to change the applicability of the LHWCA to railroad workers in either amendment: they were covered before and afterward.

[6] As Rep. Miller proclaimed:

> We meant what we said and we said what we meant. We do not want to see protracted court battles over the intent of Congress. If it isn't in the statute or clarified in the statement of the managers, it should be accorded little if any legislative intent.

130 Cong. Rec. 25,902 (1984) (remarks of Rep. Miller introducing Conference Report on S. 38, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1984).

13; Goode Brief on Merits at 9. It is patently absurd to attribute an "intent" to a legislative body based on the failure of an industry segment to express an opinion on pending legislation. It is more likely that Congress interpreted the absence of "sophisticated and politically active employers, such as the railroads, and their equally sophisticated and active employee representatives"[7] as the acquiescence of the industry in the accepted application of the Act to railroad employees.

Respondents also complain that the petitioners seek to deny Goode, Schwalb and McGlone their "traditional, superior remedy" under the FELA. *See* Schwalb/McGlone Brief on Merits at 16; Goode Brief on Merits at 7-8. But petitioners seek only to follow the statutory course charted by Congress: where railroad workers properly fall within the definition of maritime employees, the LHWCA provides their exclusive remedy. Further, while these three railroad workers might be willing to gamble on an eventual "superior" award at the conclusion of an FELA trial, any decision regarding the status of these respondents will affect other workers who might prefer the certainty and immediate benefits provided by the non-tort LHWCA compensation program. Particularly where the worksite injury does not result from employer negligence, the LHWCA no-fault remedy is superior to the FELA, which would provide no recovery.[8]

---

[7] *See* Goode Brief on Merits at 9.

[8] Philosophically, no-fault compensation programs are generally viewed as superior to liability acts, which consume in litigation funds that could be used for worker compensation. *See* Brief for

Finally, respondents contend that they should be excluded from LHWCA coverage because they are entitled to receive various benefits (retirement, unemployment, and health insurance for non-work sickness or injury) accruing specially to employees of interstate railway companies. *See* Schwalb/McGlone Brief on Merits at 14; Goode Brief on Merits at 4-5. Nowhere in the Act is there an exclusion from coverage for workers who have special additional retirement or disability benefits. These extraneous advantages, like union membership, are unrelated to the purpose of the Act and are simply irrelevant to the determination of respondents' status under the LHWCA. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 269 n.30 (1977).

In sum, while respondents would fall within the scope of the FELA absent the exclusivity provision of the LHWCA, their status as maritime workers requires their work-injury claims to be adjusted under the LHWCA. Respondents' theory that railroad employees are excluded from LHWCA coverage is a "theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage. . . ." *Northeast Marine Terminal*, 432 U.S. at 278.

---

the United States as Amicus Curiae Supporting Petitioners at 23 n.28. The LHWCA has achieved its stated purpose of providing "an adequate, prompt, and equitable system of compensation." S. Rep. No. 1125, 92d Cong., 2d Sess. (1972). By contrast, there have been efforts to abolish the FELA and replace it with a compensation system almost since its inception. *See* 4 A. Larson, *Larson's Workmen's Compensation Law* § 91.74 (1989) (since 1912 FELA has provoked unfavorable comparison with state compensation acts). As recently as April 1989, the Senate Committee on Commerce, Science and Transportation considered an amendment to S. 462 (Amtrak Authorization Bill), 101st Cong., 1st Sess. (1989), that would have removed Amtrak from the FELA for three years. Senator Kasten, the sponsor of the amendment, has stated that he will offer the amendment for consideration by the entire Senate, even though the committee's tie vote (10 to 10) removed the FELA amendment from the reported bill.

II. The LHWCA Extends to All Workers Who Directly Further Longshoring Operations

Congress implemented the LHWCA to cover all workers (other than ships' crews) who are engaged in maritime employment, employed by a maritime employer, and injured at a maritime situs. The formula adopted in 1972 has been refined by judicial and administrative decisions and by amendment in 1984. Nevertheless, the pre-eminent concept of the Act is the compensation of injuries to those workers who regularly provide service to various maritime industries (loading, unloading, building, and repairing ships). In addition to the enumerated examples of maritime employees, 33 U.S.C. § 902(3) (the "status provision") specifically encompasses "harbor-workers" and any persons other than longshoremen who are "engaged in longshoring operations."[9] This language, being undefined in the Act, must be presumed to bear its ordinary and accepted meaning. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). Full effect must be given to each word Congress used in defining the employees entitled to LHWCA coverage so that the legislative purpose expressed by those words is not diminished or distorted. *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951).

---

[9] This Court has already construed the word "including" in § 902(3) to "indicate that 'longshoring operations' comprise a part of the larger group of activities that make up 'maritime employment.' " *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n.7 (1979) (citing Webster's New Collegiate Dictionary).

The term "longshore" means "existing, occurring, employed, or working along the shore or waterfront."[10] and "operation" means "a process or action that is part of a series in some work."[11] Thus, employees are "engaged in[12] longshoring operations" if they are participating in work occurring along the shore or waterfront. A narrower definition would circumscribe those employees working along the shore or waterfront who participate in the process that results in the movement of cargo to or from ships. With respect to the term "harbor worker," the Benefits Review Board has adopted the following definition for purposes of determining LHWCA status:

> For future application of the "status" test, at least *those persons directly involved in* the construction, *repair*, alteration *or maintenance of harbor facilities* (which include

---

[10] Webster's *New World Dictionary of the American Language* (2d College ed.). A "longshoreman" is a "person who works on the waterfront loading and unloading ships." *Id.* Congress did not restrict coverage to "other persons performing the work of longshoremen."

[11] *Id.* This noun is also defined as "the act, process, or method of operating," leading back to the definition of the verb "to operate," which denotes bringing about or acting to produce an intended or desired effect. *Id.* A person who furthers longshoring, then, is a person who is engaged in longshoring operations.

[12] "Engaged in" connotes "being involved in" or "taking part in" an activity. *Id.*

> docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships) will be deemed "harbor workers" within the meaning of Section 2(3) of the Act.

Stewart v. Brown & Root, Inc., 7 BEN. REV. BD. SERV. (MB) 356, 365 (Jan. 12, 1978) (emphasis supplied), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087 (4th Cir. 1979), *cert. denied*, 446 U.S. 1087 (1980). The record below shows that respondents Goode, Schwalb and McGlone were, by definition, harbor workers who were also engaged in longshoring operations, as contemplated by 33 U.S.C. § 902(3).

In determining the intended scope of the LHWCA status provision the crucial factor is the "nature of the activity to which a worker may be assigned." *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82 (1979). The lower courts found that these respondents were employed in jobs that are integrally related and essential to the coal-loading process, an undeniably maritime activity. Despite respondent Goode's self-serving characterization that he is a traditional railroad worker,[13] his job assignment was pier machinist, a job the trial court found to be overwhelmingly devoted to "maintaining and repairing machines and equipment essential to the coal dumping operation." [JA: 36] Goode's own witnesses stated that pier machinists are regularly assigned to work on pier machinery over the water. [JA: 191, 195] Similarly, respondents Schwalb and McGlone portray themselves as typical railroad workers performing janitorial services.[14] Yet the trial court found that Schwalb, who cleaned coal each shift from the machinery and conveyor belts in the loading towers and dumpers, was engaged in work "essential to the loading and unloading of coal by conveyor belt to the ships moored at the docks." [JA: 29] The trial court viewed McGlone's job of cleaning spilled coal from the loading towers and dumpers to be essential to the unimpeded flow of coal into ships. [JA: 31] The towers maintained by Schwalb and McGlone are located offshore on the pier. [JA: 94][15] The jobs to

---

[13] Goode argues that the retarder he was repairing was identical to retarders used throughout all rail systems. This argument, first, ignores the uncontradicted evidence introduced at the hearing on jurisdiction that the retarders on the dumpers are unique in configuration and in operation. [JA: 145] Second, it disregards the crucial finding by Judge Waters that "the sole purpose of this retarder was to stop the loaded cars on the dumper to facilitate the transportation of coal from shore to vessel by dumping the coal on conveyor belts which feed the coal into the belly of docked vessels at pier 6." [JA: 35]

---

[14] Respondents Schwalb and McGlone contend that their janitorial duties place them within the exception of *Dravo Corp. v. Banks*, 567 F.2d 593 (3d Cir. 1977). *Dravo*, a pre-*Pfeiffer* case, supports LHWCA coverage if there is a "close functional nexus" between the job in question and maritime activity or if the worker's primary duties are a "necessary incident" of maritime activity. 567 F.2d at 595. Unlike Banks, whose primary job was cleaning up ordinary trash at an industrial plant, Schwalb and McGlone were retrieving cargo that had fallen from the conveyor belts so that the loading equipment would not jam. *See* JA: 29 and JA: 31 (unless stray coal removed, coal loading would stop). Their work has a close functional nexus to the coal-loading process and is a "necessary incident" of a decidedly maritime activity. Thus, Schwalb and McGlone are maritime workers under the *Dravo* rationale.

[15] Contrary to respondents' contentions, petitioners do not ask the Court to find coverage simply on the basis of injury at a covered situs, *see* Schwalb/McGlone Brief on Merits at 11, nor to extend the covered situs back to the coal mines. *See* Goode

which respondents were regularly assigned and the tasks actually being performed at the time each was injured were predominantly and essentially maritime in nature. There is no principled basis for denying the applicability of the LHWCA to these employees.

To avoid the consequences of acknowledging the essential maritime nature of their work, respondents would rather focus on isolated aspects of their jobs, such as Schwalb's additional responsibility for sweeping the oil house or McGlone's additional work cleaning bunkhouses or Goode's very infrequent participation in putting hopper cars back on track in emergency derailments at the loaders or the fact that none of the respondents actually loaded or unloaded coal. The problem with focusing on these isolated details is that one quickly loses sight of the "nature of the activity" in general. Impaired by such analytical myopia, it would be possible to confuse Blundo, the checker, with a court clerk;[16] or Caputo, the terminal laborer, with a supermarket shopper[17] or a linetender with a cowboy.[18] The fallacy in this analysis is that it disregards the critical component: the activity that is furthered by the work performed and that infuses the particular task with purpose. When the focus shifts back to the essential nature or purpose of their work, Blundo and Caputo regain their status of mar-

---

Brief on Merits at 18. As this Court has observed previously, § 3(a) provides the geographic limits of the Act's coverage. *Pfeiffer*, 444 U.S. at 78. These cases raise issues of status, not situs.

[16] Both scrutinize groups of items for conformance to standards, mark them with identifying numbers, and then stack them in large metal boxes.

[17] Both wheel cheeses in carts.

[18] Both secure moving objects with looped ropes.

itime employees and respondents are correctly perceived as engaged in maritime activity furthering the loading of coal into ships.

Respondents' references to "traditional railroad work" and "traditional longshoring work" simply cloud the status issue and demonstrate the futility of expecting these outmoded concepts to solve today's jurisdictional issues. Under the standard proposed by Goode, "if a worker is not performing traditional longshoring work or is not involved in moving cargo between ship and land transportation, the worker is not covered by the LHWCA." Goode Brief on Merits at 19. *See id.* (contending Goode performing traditional railroad work, not traditional longshoring work). Respondents Schwalb and McGlone echo Goode in their contention that "LHWCA benefits should not be extended to those employees who are not actually involved in loading or unloading cargo between ship and land transportation or performing tasks traditionally performed by longshoremen." Schwalb/McGlone Brief on Merits at 11. *See id.* (Schwalb and McGlone not engaged in tasks traditionally performed by longshoremen). Yet, as this Court has acknowledged,[19] the 1972 Amendment was inspired by the shift away from "traditional" longshoring operations due to the development of mechanized loading technology, such as LASH loading systems or petitioners' automated coal-loading systems. Neither the original Act nor its amendments premise LHWCA coverage on the performance of "traditional longshoring work"

---

[19] *See Pfeiffer*, 444 U.S. at 74 (Congress expanded LHWCA coverage in 1972 in part due to changes in traditional longshore functions occasioned by advent of containerization).

and there is no basis to infer such a requirement from the legislative history.

Goode, Schwalb, and McGlone were pierside workers who were regularly assigned to repair and maintain shiploading equipment and structures used in or related to ship-loading. For more than a decade, such employees have been included under the LHWCA even if they never load or unload cargo and never work over navigable water. *See* Pet. Brief on Merits in No. 88-127, at 12-17 (discussing numerous federal and administrative decisions holding repair and maintenance workers to have status of maritime employees). Congress has never excluded from LHWCA coverage those harbor workers who repair or maintain loading and unloading equipment.[20] Congress restricted benefits for clerical employees who work exclusively in offices,[21] but no similar restriction applies to repair and maintenance workers. Even if such a restriction can be imposed by analogy to exclude from the LHWCA all maintenance workers who only clean office spaces and repair workers who only work in shops, these respondents would nevertheless remain within the Act: they are the Blundo's of the repair and maintenance trade.

---

[20] As the United States points out in its Brief in Support, the 97th Congress considered and deliberately rejected an exception for maintenance and repair workers. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at n.13 and accompanying text. The logical inference from this legislative decision is that Congress considered such employees to be correctly included in the LHWCA program and intended that such coverage continue. *See supra* note 2.

[21] Section 902(3) was amended in 1984 to exclude from coverage "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work." The rationale for this exclusion was that these workers "are not intimately concerned with the movement and processing of ocean cargo and . . . are themselves confined, physically and by function, to the administrative areas of the employer's operations." 130 Cong. Rec. 25,903 (1984) (remarks of Rep. Miller).

Any decision to exclude Goode, Schwalb and McGlone from coverage will affect the status of, and therefore the benefits available to, a wide circle of other harbor workers who are ineligible for FELA benefits. The decision in these cases will either validate the application of the Act by the federal circuit courts and the Benefits Review Board to all workers who regularly repair and maintain maritime equipment or cast the majority of these workers back into the miasma of the divers state compensation acts. This result would be inconsistent with the overall intent of Congress to create an expanded and uniform system of coverage for all employees exposed to the same maritime hazards.

Respondent Goode, admitting that a "line must be drawn somewhere," has chosen the Belt Change (BC) House as the correct dividing point. "From this point on," Goode contends, "the machinery is clearly an integral part of the ship loading process." *See* Goode Brief on Merits at 18. The BC House, even as Goode describes it, is simply one interchange among many where the coal moves from one conveyor belt to another in its progress from the dumper to the ship.[22]

Even if there were some magic associated with the BC House meriting its designation as the LHWCA demarcation line, respondents would nevertheless be covered by the Act since they all regularly worked seaward of this point. But the major fallacy of Goode's contention is that it resurrects the "point of rest" rationale rejected by this Court in *Northeast Marine Terminal*, 432 U.S. at 278. If the BC House were to divide covered from non-covered employment, Goode, Schwalb and McGlone and all employees in their job categories would walk in and out of coverage during each shift. Selecting a jurisdictional gateway in the middle of the loading sequence would "revitalize the shifting and fortuitous coverage that Congress intended to eliminate." *Id.* at 274. This result is inimical to the intent of Congress and must be avoided.

CONCLUSION

Petitioners contend that their employees who regularly maintain or repair loading equipment on or near the piers are comprehended by the terms of § 902(3) and were intended by Congress to receive LHWCA benefits. The judgments of the Virginia Supreme Court are inconsistent with the language and the intended scope of the Act and are incompatible with rulings by federal and administrative judges on similar facts. Respondents Schwalb, McGlone and Goode are maritime employees whose injuries should be compensated under the LHWCA.

---

[22] Based on Goode's evidence at the hearing on jurisdiction, Judge Waters found that the loading process begins at least at the Barney Yard, which acts as a staging area for the coal delivered to Lanbert's Point. [JA: 35] In the coal-loading process, individual coal cars are moved one by one across the scales, through the thaw sheds, and into the dumpers. The coal that is dumped from each car travels on the hopper feeder belt, to the A belt, the B belt, the C belt, the D belt, the E belt, and the F belt into the hold of the vessel. The Belt Change, or BC, House is "just a transfer point where the belt dumps from B belt onto C belt." [JA: 139]

Respectfully submitted,

WILLIAM T. PRINCE*
EDWARD L. OAST, JR.**
JOHN Y. RICHARDSON, JR.
JOAN F. MARTIN
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510
804-624-2600

**Counsel of Record*
In 87-1979
***Counsel of Record*
In 88-127

AMICUS CURIAE

BRIEF

FILED
APR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

(7) (7)

Nos. 87-1979 and 88-127

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

ROBERT T. GOODE, JR.

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

REPRINTED COPY

WILLIAM C. BRYSON
Acting Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTINE DESAN HUSSON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY G. THORN
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

CHRISTINE L. OWENS
Attorney
Department of Labor
Washington, D.C. 20210

38 pp

QUESTION PRESENTED

Whether "employee[s]" engaged in "maritime employment" under Section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3) (1982 & Supp. IV 1986), include not only those workers who actually load or unload cargo but also all workers on a covered site who perform work that is an essential element or integral part of the process of loading or unloading.

TABLE OF CONTENTS

Page

Interest of the United States 1

Statement 2

Summary of argument 7

Argument:

"Employees" engaged in "maritime employment" include all workers on a covered situs who perform work that is an essential element or integral part of the process of loading or unloading 10

- A. The broad language and the legislative history of the LHWCA's status provision require an expansive view of the Act's coverage 10
- B. The state court's standard conflicts with the principles of coverage enunciated by this Court and followed by the lower federal courts and the Benefits Review Board 19
- C. The Department of Labor's view on the scope of LHWCA coverage is entitled to deference 29

Conclusion 30

TABLE OF AUTHORITIES

Cases:

Bennett v. *Mason Terminals, Inc.*, 14 Ben. Rev. Bd. Serv. (MB) 526 (1981) 24

Cabezas v. *Oceanic Container Serv., Inc.*, 11 Ben. Rev. Bd. Serv. (MB) 279 (1979) 24

Calbeck v. *Travelers Ins. Co.*, 370 U.S. 114 (1962) 10, 28

Caldwell v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980) 26

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 30

Conti v. *Norfolk & W. Ry.*, 566 F.2d 890 (4th Cir. 1977) 26

De Robertis v. *Oceanic Container Service, Inc.*, 14 Ben. Rev. Bd. Serv. (MB) 284 (1981) 24

Cases – Continued: Page

Director, OWCP v. *Perini North River Assocs.*, 459 U.S. 297 (1983) 7, 11, 13, 27

Garvey Grain Co. v. *Director, OWCP*, 639 F.2d 366 (7th Cir. 1981) 23

Harmon v. *Baltimore & O.R.R.*, 741 F.2d 1398 (D.C. Cir. 1984) 22, 26

Herb's Welding, Inc. v. *Gray*, 470 U.S. 414 (1985) 6, 14, 18, 21, 27

Hullinghorst Indus., Inc. v. *Carroll*, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982) 23

Knickerbocker Ice Co. v. *Stewart*, 253 U.S. 149 (1920) 10

Lorillard v. *Pons*, 434 U.S. 575 (1978) 17

Morrison-Knudsen Constr. Co. v. *Director, OWCP*, 461 U.S. 624 (1983) 30

Nacirema Operating Co. v. *Johnson*, 396 U.S. 212 (1969) 11

NLRB v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) 14

Newport News Shipbuilding & Drydock Co. v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978) 22, 26

Nogueira v. *New York, N.H. & H.R.R.*, 281 U.S. 128 (1930) 4, 27-28

Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977) .... *passim*

Parker v. *Motor Boat Sales*, 314 U.S. 244 (1941) 28

P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 (1979) 9, 12, 13, 14, 20, 21, 26, 27

Pennsylvania R.R. v. *O'Rourke*, 344 U.S. 334 (1953) 26, 28

Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980) 22

Powell v. *Cargill, Inc.*, 444 U.S. 987 (1979), vacating & remanding 573 F.2d 561 (1977), after remand, 625 F.2d 330 (9th Cir. 1980) 26

Powell v. *International Transp. Services*, 18 Ben. Rev. Bd. Serv. (MB) 82 (1986) 23

Price v. *Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. (1980) 5, 6, 23, 26

Cases – Continued: Page

Prolerized New England Co. v. *Benefits Review Bd.*, 637 F.2d 30 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981) 23

Prolerized New England Co. v. *Miller*, 691 F.2d 45 (1st Cir. 1982) 22

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 15, 30

Ryan Stevedoring Co. v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 11

Sea-Land Services, Inc. v. *Director, OWCP*, 685 F.2d 1121 (9th Cir. 1982) 22, 25

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85 (1946) 11

Southern Pac. Co. v. *Jensen*, 244 U.S. 205 (1917) 10, 11

Sun Ship, Inc. v. *Pennsylvania*, 447 U.S. 715 (1980) 10, 11

Urie v. *Thompson*, 337 U.S. 163 (1949) 28

Verderane v. *Jacksonville Shipyards, Inc.*, 20 Ben. Rev. Bd. Serv. (MB) 62 (1984) 23-24

Vogelsang v. *Western Maryland Ry.*, 670 F.2d 1347 (4th Cir. 1982) 26

Voris v. *Eikel*, 346 U.S. 328 (1953) 13

Washington v. *W.C. Dawson & Co.*, 264 U.S. 219 (1924) 10

Weyerhaeuser Co. v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976) 6, 25

White v. *Norfolk & W. Ry.*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977) 5, 24, 25

Wilkerson v. *McCarthy*, 336 U.S. 53 (1949) 28

Wuellet v. *Scappoose Sand & Gravel Co.*, 18 Ben. Rev. Bd. Serv. (MB) 108 (1986) 23

Zenith Radio Corp. v. *United States*, 437 U.S. 443 (1978) 30

Statutues:

Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* 4
  45 U.S.C. 52 4
  45 U.S.C. 56 4

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 1, 4
  § 2(3), 33 U.S.C. 902(3) 2, 4, 7, 12
  § 2(3), 33 U.S.C. 902(3) (Supp. IV 1986) 2, 4, 7, 16

Statutes – Continued: Page

§ 3(a), 33 U.S.C. 903(a) 12
§ 5, 33 U.S.C. 905 26
§ 21(b)(3), 33 U.S.C. 921(b)(3) 21

Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 27(d)(1), 98 Stat. 1654 1

Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, § 3, 44 Stat. 1426 10

Miscellaneous:

127 Cong. Rec. 9829 (1981) 16

129 Cong. Rec. 16,255 (1983) 17

130 Cong. Rec. (1984):
p. 8322 18
p. 8324 17
p. 8325 17
p. 8335 19
p. 25,902 .... 17, 18
p. 25,903 .... 18, 19
p. 25,905 17
p. S11622 (daily ed. Sept. 20) 17, 18, 19
p. S11623 (daily ed. Sept. 20) 17

4 A. Larson, *Larson's Workmen's Compensation Law* (1989) 23, 24, 28-29

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972) 11, 12, 13, 14, 27

H.R. Rep. No. 570, 98th Cong., 1st Sess. (1983) 16, 17, 18

1 M. Norris, *The Law of Maritime Personal Injuries 3d* (Supp. 1988) 24

Office of Workers' Compensation Programs, Employment Standards Admin., U.S. Dep't of Labor, *LHWCA Program Memorandum No. 58, Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act* (Aug. 10, 1977) 29

Report of the National Commission on State Workmen's Compensation Laws (Washington, D.C., July 31, 1972) 14, 15, 29

Miscellaneous – Continued: Page

S. 1182, 97th Cong., 1st Sess. (1981) 16

S. Rep. No. 973, 69th Cong., 1st Sess. (1926) 28

S. Rep. No. 1125, 92d Cong., 2d Sess. (1972) 11, 12, 13, 14, 15, 27

S. Rep. No. 498, 97th Cong., 2d Sess. (1982) 16

S. Rep. No. 81, 98th Cong., 1st Sess. (1983) 16, 17, 18, 19

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1979

CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE

No. 88-127

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

ROBERT T. GOODE, JR.

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Secretary of Labor, through the Department of Labor's Office of Workers' Compensation Programs (OWCP), administers the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*[1] The Director of the OWCP is a party to and may participate in any proceedings under the Act. These cases require the Court to determine the scope of the employee status requirement for coverage set forth in Section 2(3) of the LHWCA, 33 U.S.C. 902(3) (1982 & Supp. IV 1986). As indicated in our brief filed at the Court's invitation at the petition stage, resolution of the issue will affect federal policy concerning coverage provided by the Act and will implicate the Secretary's administration of the Act. The United States therefore has a substantial interest in this case.

---

[1] The Longshoremen's and Harbor Workers' Compensation Act was retitled by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 27(d)(1), 98 Stat. 1654.

STATEMENT

1. Petitioners, Chesapeake and Ohio Railway Company (C&O) and Norfolk and Western Railway Company (N&W), operate coal loading terminals in the Hampton Roads area of Virginia. C&O's terminal abuts the James River (87-1979 Pet. 7), while N&W's facility, known as Lambert's Point, adjoins the Elizabeth River (88-127 Pet. 7). Petitioners' freight trains transport coal mined inland for loading onto ships docked at the terminals' piers. Upon arrival, the coal-laden railway cars remain in the terminals' "barney" yards until the shiploading process begins. J.A. 35. The process of loading coal into ships' holds is highly mechanized and, in all material respects, identical at both petitioners' terminals. When shiploading begins, railway cars move one-by-one from the barney yards and onto "dumpers" at the land end of the piers. A mechanical device called a "retarder" stops each loaded coal car at the correct position on the dumper. Next, other mechanical devices lift and rotate the car, so that its contents drop through a hopper to conveyor belts that feed the coal directly onto the waiting ships. After unloading, the cars roll back to the terminals' holding yards, from which they are eventually sent inland. Barring mechanical failure or other incident, the coal loading process is continous from the time a car leaves the barney yard until it returns, empty, to the holding yard. J.A. 21, 35; 87-1979 Pet. 7-9; 88-127 Pet. 8-9.

The respondents in No. 87-1979, Nancy J. Schwalb and William McGlone, were laborers employed by C&O to perform general cleaning at its terminal. Though each had varied duties, they both were frequently required, during the actual shiploading process, to clear away coal that spilled from the conveyor belts and the "trunnion rollers," the devices at the ends of the dumper that enable it to rotate suspended railway cars. Failure to clear away this "trash coal" results in malfunction of the shiploading equipment, thus halting the loading process. J.A. 21, 29, 30-31; 87-1979 Pet. 9. While Schwalb and McGlone easily could have replaced the trash coal on the conveyor belts, applicable union agreements prohibited them from doing so; rather, laborers from a different department performed that task. J.A. 21; 87-1979 Pet. 9-10; 87-1979 Br. in Opp. 5.

The respondent in No. 88-127, Robert J. Goode, Jr., was a machinist for N&W who worked in the Motive Power Department at Lambert's Point.[2] That department's function was to maintain and operate the coal facility, with machinists in the Department devoting the majority of their time to maintaining and repairing loading equipment and machines. J.A. 35-37.

Schwalb sustained a serious head injury on January 11, 1983, when she fell while walking to clear trash coal from the trunnion rollers. 87-1979 Pet. 10-11; 87-1979 Br. in Opp. 2. McGlone was injured on February 1, 1983, as he was attempting to clear away trash coal beneath a moving conveyor belt. 87-1979 Pet. 10; 87-1979 Br. in Opp. 3. Goode was injured on February 11, 1985, while repairing the retarder located on one of the dumpers at Lampert's Point. 88-127 Pet. 9-10; N&W Br. in Opp. 2-3. Each respondent brought a timely action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, in the appropriate circuit court of Virginia. J.A. 20-21; N&W Br. in Opp. 2. C&O filed special pleas to the courts' jurisdiction, contending that the respondents' exclusive remedy was under the LHWCA, 33 U.S.C. 901 *et seq.* N&W moved to dismiss on the same basis. J.A. 28-29, 30, 34-35.[3]

---

[2] N&W employs machinists throughout its rail system, assigning them to different sites and different jobs on the basis of seniority. J.A. 35-36; 88-127 Br. in Opp. 5-6.

2. The courts for the Third Judicial Circuit (*McGlone*), Fourth Judicial Circuit (*Goode*), and Seventh Judicial Circuit (*Schwalb*) of Virginia each decided that the LHWCA applied to respondents' claims, sustained petitioners' jurisdictional challenges, and dismissed the FELA actions. J.A. 40-42, 34-35. In each case, the court found no serious dispute that the respondents satisfied the LHWCA's "situs" requirement by working in a statutorily covered geographical area (J.A. 28-29, 31, 38-39), and thus focused principally on whether the respondents were "employee[s]" as defined by Section 2(3) of the Act, 33 U.S.C. 902(3) (1982 & Supp. IV 1986).

In resolving this issue of employee status, the circuit courts in the *McGlone* and *Goode* cases explicitly acknowledged a conflict between the restrictive approach to the question that the Virginia Supreme Court followed

---

[3] FELA makes "common carrier[s] by railroad" liable in damages to their employees for work-related injuries occurring as a result of employer negligence, and confers concurrent jurisdiction over claims under the Act on state and federal courts. 45 U.S.C. 52, 56. As this Court long ago recognized, however, the LHWCA is the exclusive remedy for railroad workers who are injured while engaged in maritime employment. *Nogueira* v. *New York, N.H. & H.R.R.*, 281 U.S. 128, 136-138 (1930).

in *White* v. *Norfolk & W. Ry.*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977), and the more expansive standard adopted by the federal courts of appeals in such decisions as *Price* v. *Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980). J.A. 31-33, 37-38. The courts viewed the Virginia Supreme Court's *White* standard as confining LHWCA coverage to only those workers on the situs who were "directly involved" in the loading of cargo. J.A. 31-32, 37-38. By contrast, the courts believed, the prevailing standard among the federal courts of appeals is considerably broader, encompassing all workers on the situs whose jobs comprise "an essential element in the loading and unloading of the vessels." J.A. 32, 38. As the *McGlone* court interpreted it, the federal standard does not require an employee to be involved "in the actual loading of ships," if the maintenance work the employee performed "was essential to the movement of maritime cargo." J.A. 32. The *McGlone* and *Goode* courts resolved this conflict between state and federal court interpretations against adherence to the Virginia Supreme Court's test; in their view, following *White* "would be to interpret a Federal law contrary to all of the decisions of the Federal courts" (J.A. 33), and the test formulated by the federal courts was, in fact, the proper test. J.A. 38.

Applying the federal courts' status test, the Virginia circuit courts concluded that the LHWCA covered the respondents because they performed tasks essential to the loading of coal at petitioners' terminals. McGlone's cleaning duties were essential because the failure to clear away coal that had fallen from the belts "would eventually interfere with the loading operation and bring it to a halt." J.A. 31. Similarly, Schwalb's cleaning duties conferred LHWCA coverage because "if the spilled coal was not removed * * * it could have haulted [*sic*] the process of loading the coal aboard the vessels." J.A. 29. And Goode was an employee under the LHWCA because he maintained and repaired equipment and machines "directly and solely related to the loading and unloading operation" (J.A. 37), and was thus "involved in the essential elements of loading and unloading" (J.A. 36-37, citing *Herb's Welding, Inc.* v. *Gray,* 470 U.S. 414, 423 (1985)).[4]

3. The Supreme Court of Virginia consolidated Schwalb's and McGlone's appeals and reversed. J.A. 20-27. The court acknowledged that the United States Court of Appeals for the Fourth Circuit had applied the LHWCA to a painter who did not actually handle cargo but who had maintenance duties essential to the "entire [loading] process" (J.A. 24-25 (quoting *Price,* 618 F.2d at 1062 n.4)), and agreed here that the failure to remove "trash coal" could interrupt that process. J.A. 21. But the Virginia court rejected the *Price* court's reasoning and conclusion (J.A. 24-27), refused to adopt the "overall process" standard, and adhered instead to the restrictive test set out in *White.* J.A. 26-27. Under that test, the court held, workers must show that their " 'own work and employment' " bears " 'a realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters,' " to bring themselves within the LHWCA. J.A. 23-24, quoting *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976). Reading this Court's "essential elements of [loading or] unloading" language in *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977), to limit LHWCA coverage only to those employees actually "engaged in the handling of cargo" (J.A. 25, quoting 432 U.S. at 267), the Virginia Supreme Court concluded that "the [*Northeast Marine Terminal*] 'essential elements' standard is more nearly akin to the [*White*] 'significant relationship' standard * * * than [to] the 'overall process' construction." J.A. 26. Without considering how essential their duties were to the overall loading process, the court held that since Schwalb and McGlone performed "purely housekeeping and janitorial tasks," they "were not statutory employees as defined in the LHWCA." *Ibid.* Application of the *White* test thus required reversal of the circuit courts' judgments. Subsequently, relying on its opinion in *Schwalb,* the Supreme Court of Virginia reversed the judgment in *Goode* as well. J.A. 46.[5]

SUMMARY OF ARGUMENT

1. The Supreme Court of Virginia erroneously construed Section 2(3), 33 U.S.C. 902(3), of the LHWCA to require that workers be directly involved in the physical process of loading or unloading cargo in order to qualify as employees under the Act. Congress defined "employee"

---

[4] The circuit court in *Goode,* explicitly concluding that the federal standard should prevail over the State's *White* standard to the extent that the standards differed, held in the alternative that the activities of Goode qualified him for coverage under the *White* test as well. J.A. 37.

[5] The Court did not consider, as an independent ground on which it could sustain the lower court's holding, the fact that Goode's duties as a pier mechanic at times involved work "over the water" (88-127 Br. in Opp. 6; J.A. 191, 195), and that such work therefore may have qualified Goode as a covered employee under *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249, 273 (1977) (post-1972 LHWCA meant to cover "amphibious workers" or those who spent "at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity") and *Director, OWCP* v. *Perini North River Assocs.,* 459 U.S. 297, 311-312 (1983) (workers injured on navigable waters before 1972 were covered under LHWCA without regard to duties performed; post-1972 Act covers all who were previously covered).

to mean "any person engaged in maritime employment." The breadth of the statutory language suggests that courts should take an expansive view of the LHWCA's extended coverage, to include any worker who performs work that is an essential element or integral part of the cargo-handling process. Moreover, the remedial purposes of the 1972 amendments, which amended Section 2(3) to eliminate disparities in benefits due to the location of injuries and to adapt the Act's coverage to the realities of modern shipping practices, demand a liberal construction of the status requirement. The legislative history of the 1984 amendments to the LHWCA further confirms the propriety of reading the status provision broadly. These amendments specifically exclude from coverage certain narrow categories of employees whose connection to maritime employment is considerably more tenuous than that of respondents here. Even as to these exclusions, however, Congress precluded LHWCA coverage only if the workers involved were eligible for benefits under state workers' compensation schemes.

2. The state court's standard also conflicts with the principles of coverage enunciated by this Court and followed by the lower federal courts and the Benefits Review Board. This Court has explicitly admonished that the Act's status provision should be interpreted broadly and in functional terms, so that the Act achieves its objective of providing uniform coverage for those engaged in longshoring and related jobs. Thus, this Court has found coverage for an employee whose work was an integral part of the unloading process as altered by the advent of new technology, and for a terminal laborer who spent only some of his time in indisputably longshoring operations. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977). Similarly, the Court has found coverage for two land-based workers who did not load or unload material directly to or from ships, but who nonetheless were responsible for some portion of the loading and unloading activity and thus performed tasks that were an integral part of the overall process of loading or unloading cargo. *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979). In so doing, the Court has rejected distinctions in coverage on the basis of union labels, the "point of rest" theory, or similar restrictions created by employer assignment policies, because they would artificially curtail the functional analysis required by the Act.

Consistently with these decisions, the courts of appeals and the Benefits Review Board have uniformly viewed the question whether employees are engaged in "longshoring" and thus have status under the Act by focusing on the nexus between a worker's actual duties and the overall process of loading and unloading cargo. Employing this functional approach, the courts of appeals and the Board have extended LHWCA coverage to any employee on a covered situs who, like respondents, performs duties that comprise an "essential element" or "integral part" of the overall loading and unloading process, even if those duties do not themselves include physically or mechanically handling maritime cargo. The court below erred in rejecting this approach and in limiting the Act's coverage to only that considerably smaller class of employees who have a direct involvement with the physical process of loading and unloading cargo.

3. Finally, the state court's restrictive interpretation of landward coverage under the LHWCA conflicts with the Department of Labor's interpretation of the Section 2(3) status requirement, an interpretation the Department has consistently applied since 1972 in administering the LHWCA workers' compensation program. Because that interpretation is based on a permissible construction of the statute, it is entitled to deference and should be given effect.

ARGUMENT

"EMPLOYEES" ENGAGED IN "MARITIME EMPLOYMENT" INCLUDE ALL WORKERS ON A COVERED SITUS WHO PERFORM WORK THAT IS AN ESSENTIAL ELEMENT OR INTEGRAL PART OF THE PROCESS OF LOADING OR UNLOADING

A. The Broad Language And The Legislative History Of The LHWCA's Status Provision Require An Expansive View Of The Act's Coverage

1. The language and legislative history of the 1972 amendments indicate that they provide broader coverage of land-based workers than that identified by the Supreme Court of Virginia. Congress amended the Act in an attempt to conclude a long saga of jurisdictional disputes over the coverage of the LHWCA.[6] In particular, Congress sought to expand the Act's scope; it wanted to remedy the coverage anomaly that limited longshore and harbor workers to recovering LHWCA benefits for work-related injuries sustained on navigable waters and left those who sustained similar injuries on the adjoining land without an LHWCA remedy.[7] See. S. Rep. No. 1125, 92d Cong., 2d Sess. 1, 12-13 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11 (1972); *Perini*, 459 U.S. at 306-312;

---

[6] That saga, frequently revisited by this Court, began with this Court's determination in *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205 (1917), that a State was without power to extend workers' compensation to a worker injured on a gangplank between a wharf and a vessel lying in navigable waters. According to the Court, such state action threatened the "uniformity in respect to maritime matters" that the admiralty clause of the Constitution was meant to ensure (*id.* at 217); the Court consequently struck down two subsequent attempts by Congress to delegate the power to provide workers' compensation for maritime injuries to the States. See *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219 (1924). In response, Congress in 1927 enacted the LHWCA, which provided federal compensation to workers injured on the seaward side of the "*Jensen* line," but only "if recovery * * * [could] not validly be provided by State law." The Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, § 3, 44 Stat. 1426.

The work of hammering out the respective jurisdictions of the state and federal systems continued during the next four decades. By 1972, three jurisdictional spheres of coverage had emerged. *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 719 (1980). Concurrent federal and state remedies were available for maritime injuries that were also of "local concern" (*Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 126 (1962)), while federal remedies alone were available for maritime injuries that were not "local" in character (*Jensen*, *supra*). Finally, workers injured landward of the *Jensen* line – beyond the water's edge – were consigned to the varying remedies provided by state workers' compensation laws. As to these workers, the Court explicitly invited the Congress to intervene once again, observing that "[t]here is much to be said for uniform treatment of longshoremen irrespective of whether they were performing their duties upon the navigable waters * * * or whether they were performing those same duties on a pier." *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 316 (1983) (describing the Court's statement in *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 219 (1969)). In 1972, Congress responded to the invitation. See *Perini*, 459 U.S. at 316.

[7] The amendments changed the Act in another major respect as well. As a quid pro quo for the expansion of coverage under the Act, Congress eliminated circumvention of the LHWCA compensation system through resort to an action for unseaworthiness. *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 724 (1980); see S. Rep. No. 1125, 92d Cong., 2d Sess. 1-2, 5-12 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1-8 (1972); *Perini*, 459 U.S. at 313; *Northeast Marine Terminal*, 432 U.S. at 260-261. Prior to the 1972 amendments, a longshoreman or related worker could bring an unseaworthiness action against a ship owner for injury incurred on board the ship, and could do so even if the condition causing the injury had been the fault of the longshoreman or his or her employer. See, *e.g.*, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). The shipowner could then recover the damages paid to the worker from that worker's employer under theories of express or implicit warranty of workmanlike performance. See, *e.g.*, *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

Northeast Marine Terminal, 432 U.S. at 256-265; *Pfeiffer*, 444 U.S. at 72-73.

Congress effected the coverage change through two specific amendatory clauses. First, it modified the Act's "situs" requirement, expanding the definition of "navigable waters" under Section 3(a), 33 U.S.C. 903(a), to include " 'any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.' " *Northeast Marine Terminal*, 432 U.S. at 263. Second, Congress added a new "status" requirement to Section 2(3), 33 U.S.C. 902(3), in order "to describe affirmatively the class of workers [it] desired to compensate." *Northeast Marine Terminal*, 432 U.S. at 264. Under the amended status test, LHWCA coverage extends to injured workers "engaged in maritime employment," including specifically "any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker." 33 U.S.C. 902(3).

Congress did not define "maritime employment," "longshoreman," or "longshoring operations" in either the Act or its legislative history. See *Northeast Marine Terminal*, 432 U.S. at 265.[8] Nor is coverage limited in any

---

[8] The Committee reports accompanying the Act posit only a single "typical example" of the new status requirement: workers unloading cargo from a ship or checking it as it is unloaded are to be covered, while those picking it up for transshipment inland, or performing "purely clerical" functions not directly involved with the loading or unloading process, are not to be covered. S. Rep. No. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11 (1972); *Northeast Marine Terminal*, 432 U.S. at 266, 267. The example is useful in identifying the outer bounds of coverage, but it clearly "does not speak to all situations." *Id.* at 267.

case to the explicitly enumerated categories (like "longshoreman" and "ship repairman") that appear in the section. See S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10; *Perini*, 459 U.S. at 318 n.27. Rather, the broad language of the status test itself suggests that the courts should take "an expansive view of [its] extended coverage." *Northeast Marine Terminal*, 432 U.S. at 268.

The remedial purpose of the statute reflected in the legislative history further supports an expansive view of the Act's coverage. *Northeast Marine Terminal*, 432 U.S. at 268, citing *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). As chronicled by this Court (see 432 U.S. at 268-273), Congress decided to extend the coverage of the Act shoreward because of two main concerns. First, the fact that pre-1972 benefits under the LHWCA applied only to those workers injured over navigable waters led to a significant "disparity in benefits payable * * * for the same type of injury depending on which side of the water's edge and in which State the accident occurs." S. Rep. No. 1125, *supra*, at 12; H.R. Rep. No. 1441, *supra*, at 10. Moreover, the disparity between federal benefits and generally lower state benefits promised to widen after the passage of the federal benefit reforms contained in the 1972 amendments. S. Rep. No. 1125, *supra*, at 12-13; H.R. Rep. No. 1441, *supra*, at 10; *Pfeiffer*, 444 U.S. at 83; *Northeast Marine Terminal*, 432 U.S. at 262. Second, Congress recognized that the realities of modern shipping practices, including containerization and other technological innovations, had moved onto the land much of the longshoring work it wished to protect. S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10; *Northeast Marine Terminal*, 432 U.S. at 270.[9]

---

[9] The magnitude of the change in the longshoring industry effected by containerization alone, and the difficulties that change engenders

These concerns support a construction of the Act's landward coverage that focuses on the occupations of those the Act seeks to protect rather than the "fortuitous circumstance" of where injuries occur (S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10; see *Pfeiffer*, 444 U.S. at 78-84; *Northeast Marine Terminal*, 432 U.S. at 272-273), and that makes allowance for changing technology (see *Northeast Marine Terminal*, 432 U.S. at 269-271). As this Court has articulated the functional approach of the status provision, all employees "involved in the essential elements of loading and unloading" meet the status requirement of the Act; employees are excluded only if they are " '*not* engaged in the overall process of loading or unloading.' " *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 (1985) (quoting *Northeast Marine Terminal*, 432 U.S. at 267 (emphasis added)). Coverage thus extends to any worker "responsible for some portion of" the loading and unloading activity since he or she is "as much an integral part of the process * * * as a person who participates in the entire process." *Pfeiffer*, 444 U.S. at 82-83.[10]

---

when it is necessary to identify "longshoring tasks," have been documented by this Court. See *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) (concerning appropriate focus of work preservation agreement in longshoring industry under National Labor Relations Act).

[10] The expansion effected by the 1972 amendments is particularly telling for purposes of this case because it targeted not only inadequate state compensation systems, but tort liability remedies as well. Congress made the decision to expand its federal workers' compensation system after giving "the most careful consideration" to a report prepared by the National Commission on State Workmen's Compensation Laws. H.R. Rep. No. 1441, *supra*, at 2; S. Rep. No. 1125, *supra*, at 2; see *Report of the National Commission on State Workmen's Compensation Laws*, (Washington D.C., July 31, 1972) [hereafter *Report on Comp. Laws*]. The report compared state com-

2. In 1984, Congress further amended the status provision.[11] Both the specifics of the change and the reasoning behind it confirm that the landward scope of the status provision should be defined broadly to include employees like respondents.

First, Congress addressed the status of certain limited categories of employees more tenuously connected to maritime work than those involved here, but who had been considered by the courts to be covered by the Act. Specifically, it removed from coverage "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work"; those working for a club, restaurant, museum, or other recreational or retail establishment; those employed by a marina (including "routine maintenance" workers, but not con-

---

pensation systems to those providing remedies through actions for negligence. It found that a modern workers' compensation system could provide broad coverage through liability without fault, substantial protection against interruption of income, and assured provision of medical services, while "[e]mployees excluded from coverage are forced to fall back on liability suits, a drawn-out, costly, and uncertain process that was dismissed long-ago as a means of dealing with occupational injuries and diseases." *Report on Comp. Laws* 35, 45; see generally *id.* at 25, 119-120. Thus, the Commission endorsed as an ultimate objective "universal mandatory coverage" of workers under compensation systems. *Id.* at 44. And, in order to further that goal, the Commission recommended, *inter alia*, "that the term 'employee' be defined as broadly as possible." *Id.* at 48. Congress, in turn, noted that "the provisions in [the 1972 amendments] are fully consistent with the recommendation of the National Commission * * * [and the bill] will provide an adequate, prompt, and equitable system of compensation." S. Rep. No. 1125, *supra*, at 2.

[11] The 1984 amendments and their history are directly relevant to the instant case involving respondent Goode, who was injured on February 11, 1985. 88-127 Br. in Opp. 7. They are also relevant to the cases involving respondents McGlone and Schwalb, insofar as they clarify the intent of the 1972 amendments. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). See also note 14, *infra*.

struction or repair workers); and employees of vendors, suppliers, or transporters only temporarily on the premises of a maritime employer.[12] In fashioning these categories, Congress deliberately declined to remove employees engaged in "maintenance[] or repair of gear or equipment" from coverage of the Act: although the bill (S. 1182, 97th Cong., 1st Sess. (1981)) that became the basis for the 1984 amendment contained such an exclusion, the idea died in committee. Compare S. 1182 as introduced, 127 Cong. Rec. 9829 (1981), with S. Rep. No. 498, 97th Cong., 2d Sess. 2 (1982).[13]

Further, Congress made clear that even the exclusions it delineated "are intended to be narrowly construed." H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983). And, it provided that workers within the named categories are excluded *only* if they are eligible for state workers' compensation programs. 33 U.S.C. 902(3) (Supp. IV 1986).[14]

---

[12] Congress also exempted from the Act aquaculture workers and, for unrelated reasons, employees building, repairing, or dismantling small, recreational vessels. See H.R. Rep. No. 570, 98th Cong., 1st Sess. 6 (1983); S. Rep. No. 81, 98th Cong., 1st Sess. 26-28 (1983).

[13] The proposed bill also contained an exclusion for "railcar loading and unloading." 127 Cong. Rec. 9829 (1981). The exclusion similarly did not leave committee. See. S. Rep. No. 498, 97th Cong., 2d Sess. 2 (1982).

[14] While emphasizing the limited nature of the new exclusions, Congress simultaneously was at pains to disclaim that its exclusions implied coverage (or noncoverage) for other groups. Although the Conference Report does not repeat the refrain, the Senate Report emphasizes that:

> It is the committee's intention that these amendments not be interpreted to enlarge the present scope of the act's coverage. * * * [I]t is obvious that a large body of decisional law relative to traditional maritime employers and harbor workers remains undisturbed. [A] decision not to evaluate, endorse, or reject, explicitly or implicitly, the lower court and agency decisions in these

The reason Congress fashioned the specific exclusion it did in 1984 is also indicative of the scope of coverage under the Act. Congress sought "to reaffirm the purposes of the 1972 jurisdictional changes, and in that light * * * [to exclude] certain fairly identifiable employers and em-

---

> other areas was made deliberately by the Committee in conjunction with the limited changes that are being made.

S. Rep. No. 81, 98th Cong., 1st Sess. 26 (1983); see also, *e.g.*, 129 Cong. Rec. 16255 (1983) (remarks of Sen. Hatch); 130 Cong. Rec. 25,902 (1984) (remarks of Rep. Miller); 130 Cong. Rec. 8325 (1984) (explanation of House amendment).

While Congress's actions in 1984 must therefore be viewed with some caution, they indicate at the least that Congress considers the plain language of the status provision sufficiently broad to include those written out of the Act in 1984 – because their exclusion from coverage under the status provision becomes effective only if those same workers are covered under state acts. In the words of the House Report, workers not protected by state programs would "*remain* under the coverage of the Longshore Act." H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983) (emphasis added); see also S. Rep. No. 81, *supra*, at 18; 130 Cong. Rec. 8324 (1984) (remarks of Rep. Erlenborn) (amendments "carve out" areas); *id.* at 8325 (explanation of House amendment) (legislation recognizes that employees "now covered" by Act may have duties with only attenuated relationship to maritime employment).

Moreover, it is relevant that Congress could reach "no political consensus" to disturb the judicial interpretation of the status provision that had developed by 1984. 130 Cong. Rec. S11,623 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch). If anything, Congress indicated its acceptance of "the limits of jurisdiction [that] ha[d] begun to emerge out of the judicial process." S. Rep. No. 81, *supra*, at 25; see also 130 Cong. Rec. S11,622 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch) (courts' interpretation of LHWCA in many instances "in keeping" with congressional intent although sometimes "clearly out of bounds"); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). By 1984, the courts of appeals had consistently interpreted the coverage of the LHWCA to include maintenance and repair workers who facilitated the loading process. See note 21, *infra* (citing cases).

ployees" who, although at work on a covered situs, lack "a sufficient nexus to maritime navigation and commerce." S. Rep. No. 81, 98th Cong., 1st Sess. 25 (1983). Specifically, Congress determined whether employees had "a sufficient nexus" to things maritime by looking to either "the nature of the work which they do, or the nature of the hazards to which they are exposed." H.R. Rep. No. 570, *supra*, at 4.[15] In turn, it analyzed the "nature of the work" done in terms that confirm the broad, functional approach employed by the federal judiciary since 1972. See, *e.g.*, S. Rep. No. 81, *supra*, at 30 (excluding employees temporarily on premises because their duties were "not an integral part" of traditional maritime employment); 130 Cong. Rec. 25,903 (1984) (remarks of Rep. Miller) (coverage focuses on "substance and purpose of the work being performed as integral to overall longshore operations"); cf. H.R. Rep. No. 570, *supra*, at 3-4 (employing functional approach). Congress's consideration of the "nature of the hazards" affecting workers additionally supports coverage of workers facilitating a loading process, because they are subject to the same harbor-side risks as those actually handling cargo.[16] Cf. H.R. Rep. No. 570, *supra*, at 3 (noting that clericals confined to office work were ex-

---

[15] See also H.R. Rep. No. 570, *supra*, at 3; 130 Cong. Rec. 8322 (1984) (remarks of Rep. Miller); 130 Cong. Rec. S11,622 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch); 130 Cong. Rec. 25,902 (1984) (remarks of Rep. Miller).

[16] This Court's determination in *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 425 (1985), that the hazards faced by an employee were relevant only to the situs inquiry, not to the status provision of the Act, was made on the basis of the language and history of the 1972 amendments alone, and in the context of an employee whose work was wholly unrelated to the loading and unloading process. See note 27, *infra*.

cluded from coverage, while those who perform clerical duties on piers or in warehouses were included).[17]

In short, both the language of the status provision and the purposes expressed by Congress in 1972 and 1984 support an expansive approach to the landward coverage of the LHWCA, rather than the restrictive standard applied by the Supreme Court of Virginia.

B. The State Court's Standard Conflicts With The Principles Of Coverage Enunciated By This Court And Followed By The Lower Federal Courts And The Benefits Review Board

1. In *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, this Court first determined the reach of LHWCA coverage under the status provision of the 1972 amendments. The case involved two employees, a "checker" (the worker responsible for checking and recording cargo as it is loaded or unloaded) and a longshoreman who at the time of injury was working as a "terminal laborer" helping to load already-discharged cargo into consignees' trucks.

---

[17] Congress also acted in 1984 for a simpler end: it sought to stem the litigation generated by the 1972 status provision. S. Rep. No. 81, *supra*, at 24-25. Several members of Congress indicated their belief that the litigation had been generated by the imprecision of the definition of covered employees. See, *e.g.*, 130 Cong. Rec. 8335 (1984) (remarks of Rep. Boggs); 130 Cong. Rec. S11,622 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch). Another member indicated that the litigation had been caused by "the failure [of courts] to recognize that covered longshoring workers "have traditionally engaged in a full range of activities respecting the handling of ocean cargo" and had job tasks (including, for example, the use of computers) that reflected the advent of modern technology. See 130 Cong. Rec. 25,903 (1984) (remarks of Rep. Miller). In either case, Congress's purpose to minimize litigation must enter the calculus of the Act's interpretation. That purpose will be most effectively served by a bright line definition that clearly protects all activity on the waterfront that is "integral to overall longshore operations." *Ibid.*

After reviewing the history of the LHWCA with attention to Congress's continued efforts to provide uniform coverage to "amphibious" workers (432 U.S. at 257, 271), the Court concluded that the Act's status provision should be broadly interpreted. The Court held that the "checker" satisfied the status requirement because, although his longshoring tasks had been somewhat changed by technology (the employee was checking the contents of a container on shore on the day of the accident), his work was "an integral part of the unloading process as altered by the advent of containerization." *Id.* at 271. The Court held that the terminal laborer also met the status requirement; since he spent some of his time in "indisputably longshoring operations" (*id.* at 273), the Act's "focus on occupations and its desire for uniformity" supported continuous coverage under the LHWCA (*id.* at 276).

The court explicitly rejected restrictions that would have artificially curtailed its approach. First, it denied that union membership should determine eligibility as a "longshoreman" under the Act, noting that "[t]he vagaries of union jurisdiction are unrelated to the purposes of the Act." *Northeast Marine Terminal*, 432 U.S. at 268 n.30. Second, the Court rejected a limitation not unlike that adopted by the Virginia court here. The Court held that the "point of rest" doctrine—according to which "stevedoring" was limited to loading or unloading operations seaward of the first "point of rest" on a pier or dock from which cargo is moved into vessels or removed for further transport ashore—was incompatible with the Act's objective of extending uniform coverage on an occupational basis. *Id.* at 275, 276.

This Court confirmed its expansive interpretation of the landward extension of coverage in *P.C. Pfeiffer* v. *Ford*, *supra*, where it found coverage for two workers, neither of

whom loaded or unloaded material directly to or from ships.[18] The Court rejected any resurrection of the artificial distinctions imposed by union labels or the point of rest theory (444 U.S. at 81-82) and also rejected the creation of similar restrictions by employer "assignment policies" (*id.* at 83). Rather, the Court focused on the "nature of the activity" to which a worker could be assigned: it noted that "[l]and-based workers who do not handle containerized cargo also may be engaged in loading, unloading, repairing, or building a vessel" because "[p]ersons moving cargo directly from ship to land transportation are engaged in maritime employment * * * [and one] responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *Id.* at 80, 82-93 (citation omitted); see also *Herb's Welding*, 470 U.S. at 423, 425 (injured worker not an employee under Section 2(3) because "[h]is work had nothing to do with the loading or unloading process, nor [was] there any indication that he was even employed in the *maintenance of equipment used in such tasks*") (emphasis added).

Consistently with the rationale of these decisions, the courts of appeals and the Benefits Review Board[19] uniformly view the question whether employees are engaged in "longshoring" by focusing on the nexus between a worker's actual duties and the overall process of loading and unloading cargo.[20] This approach takes into account the reality of conventional longshoring operations: maritime employment today is significantly affected by technology, job specialization, and the vagaries of union jurisdiction. Thus, although using slightly varying terms, the courts of appeals and the Board have extended coverage under the Act to any employee on a covered situs whose actual duties comprise an "essential element" or "integral part" of the overall loading and unloading process, even if those duties do not themselves including physically or mechanically loading or unloading maritime cargo. The standard applied by the courts of appeals,[21] and by the

---

[18] Ford was a "warehouseman" injured while fastening military vehicles (which had been unloaded from a vessel days before) to a railroad flatcar. Under union rules, he was prohibited from moving cargo either directly from a vessel to a point of rest in storage or to a railroad car, or directly from shoreside point of rest onto a vessel. *Pfeiffer*, 444 U.S. at 71. Bryant was a "cotton header" injured while unloading cotton from its land transport by wagon into a pier warehouse. His loading activities were limited by union rules similar to those applied to Ford. *Id.* at 71-72.

[19] The Benefits Review Board is charged under Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3), with determining "appeals raising a substantial question of law or fact taken by any party in interest

---

from decisions with respect to [benefit] claims of employees." Since the Board is not a policymaking agency, its interpretation of the LHWCA is not entitled to deference for that reason, see *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980), but the Board does serve as a specialized administrative appellate court in cases arising under the Act.

[20] The courts use the same approach in determining whether employees are "harbor-workers." See, *e.g.*, *Newport News Shipbuilding & Drydock Co.* v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978).

[21] See, *e.g.*, *Harmon* v. *Baltimore & O.R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984) (railroad worker injured while repairing coal loading equipment is covered employee because his "functions were an integral part of the process of unloading and loading vessels and were vital to the movement of maritime cargo"); *Prolerized New England Co.* v. *Miller*, 691 F.2d 45, 47 (1st Cir. 1982) (worker performing maintenance of shiploading equipment plays "integral part" in loading process); *Sea-Land Services, Inc.* v. *Director, OWCP*, 685 F.2d 1121, 1123 (9th Cir. 1982) (LHWCA applies to mechanic responsible for repairing equipment used to load cargo onto ships and move it within terminal area because "repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' "); *Hullinghorst Indus., Inc.* v. *Carroll*, 650 F.2d 750, 755-756 (5th Cir. 1981) (carpenter building scaffolding for repairs to loading pier engaged in "maritime employment," since "the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of 'maritime employment' " under the Act and such work is "an integral part * * *, an essential and indispensable step in the [pier] repairs to be effected"), cert. denied, 454 U.S. 1163 (1982); *Garvey Grain Co.* v. *Director, OWCP*, 639 F.2d 366, 370 (7th Cir. 1981) (millwright responsible for maintenance and repair of shiploading equipment is employee under LHWCA, since these "functions are an integral part of the loading and unloading" process and "are directly connected with and are vital to the movement of maritime cargo"); *Prolerized New England Co.* v. *Benefits Review Bd.*, 637 F.2d 30, 37 (1st Cir. 1980) (coverage extends to employee whose duties include shortening scrap steel for shipment because "[v]iewed in terms of this functional analysis * * * [the claimant's] repair, maintenance and occasional operation of the varied elements of Prolerized's integrated loading system qualify as peculiarly maritime services"), cert. denied, 452 U.S. 938 (1981); *Price* v. *Norfolk & W. Ry.*, 618 F.2d 1059, 1061 (4th Cir. 1980) (railroad worker injured while painting "gallery" used for loading grain into ships falls within LHWCA's ambit because "[t]he gallery, and its maintenance, are essential to the loading and unloading of all vessels"); see also 4 A. Larson, *Larson's Workmen's Compensation Law* §§ 89.45(b), 89.45(e), 89.45(f), 89.49 (1989) (citing cases).

Board,[22] specifically encompasses workers who, like respondents, engage in cleaning, maintenance, and repair of equipment used to load ships.[23]

---

[22] See, *e.g.*, *Powell* v. *International Transp. Services*, 18 Ben. Rev. Bd. Serv. (MB) 82, 84 (1986) ("vessel planning and stowage coordinator" is employee under the LHWCA because his "duties planning the loading and unloading of cargo," though clerical, "are integral to the longshoring process and as such are peculiarly maritime"); *Wuellet* v. *Scappoose Sand & Gravel Co.*, 18 Ben. Rev. Bd. Serv. (MB) 108, 110-111 (1986) (welder/mechanic injured while repairing conveyor belt at barge loading facility is covered under LHWCA since "the repair of equipment at employer's barge facility is an integral part of the loading process * * * and therefore is a maritime activity"); *Verderane* v. *Jacksonville Shipyards, Inc.*, 20 Ben. Rev. Bd. Serv.

2. In holding that respondents were not employees under the LHWCA, the Supreme Court of Virginia expressly rejected the courts of appeals' functional test and adhered, instead, to its earlier decision in *White* v. *Norfolk & W. Ry.*, *supra*. J.A. 26-27. *White* limited coverage under the Act to those employees having a " 'realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters.' " 217 Va. at 832, 232 S.E.2d at 812 (quoting *Weyerhaeuser Co.* v.

Gilmore, 528 F.2d at 961).[24] The *White* decision makes clear that the Supreme Court of Virginia views the "realistically significant relationship" test as requiring direct involvement in the physical process of loading and unloading cargo. Thus, although White's duties required him to maintain electrical equipment essential to the coal loading process, the court concluded that he lacked the requisite relationship to the loading of cargo, because he was "not actually handling any cargo, either manually or mechanically," and "was not manipulating * * * any of the controls of the electrical mechanism, which furnished the power for this automated loading process." 217 Va. at 832-833, 232 S.E.2d at 813. Applying *White*, the court concluded here that respondents Schwalb and McGlone were not statutory employees because they also were not actually " 'engaged in the handling of cargo' " (J.A. 25), notwithstanding that failure to clean trash coal from the rollers and belts would halt the loading process (J.A. 21) and that only the "vagaries of union jurisdiction"—specifically, union agreements covering various groups of workers at the terminal—prohibited Schwalb and McGlone from placing the coal back on the belts (*ibid.*).[25] The court applied its narrow approach again when it ruled

---

(MB) 62, 64 (1984) (manager of shipyard's Medical, Safety and Security Department, whose duties required inspecting certain shipbuilding equipment and assuring compliance with safety regulations, was covered employee since he "performed an integral role in assuring" shipyard workers' safety and his duties "were important to the overall progress of maritime construction"); *Bennett* v. *Mason Terminals, Inc.*, 14 Ben. Rev. Bd. Serv. (MB) 526, 528-529 (1981) (workers refurbishing containers satisfy LHWCA's status requirement as their "work [is] essential to the continued use of containers and thus is integral to longshoring operations"; benefits precluded here, however, because workers were not employed on a covered situs); *De Robertis* v. *Oceanic Container Serv., Inc.*, 14 Ben. Rev. Bd. Serv. (MB) 284, 287-288 (1981) (container repairmen, even if "not personally involved in loading and unloading cargo from ships" are nonetheless covered employees under the LHWCA, because "they maintained and repaired equipment used in longshoring operations" and "[t]heir work was an 'integral part' of, or 'necessary ingredient' in, longshoring operations," citing *Cabezas* v. *Oceanic Container Serv., Inc.*, 11 Ben. Rev. Bd. Serv. (MB) 279, 285-286 (1979)); see also 4 A. Larson, *supra*, §§ 89.45(b), 89.45(e), 89.45(f), 89.49 (citing cases).

[23] The treatise writers agree that an expansive approach to coverage under the Act is appropriate. See 1 M. Norris, *The Law of Maritime Personal Injuries 3rd* 128 (Supp. 1988); 4 A. Larson, *supra*, § 89.42(a), at 16-261 (rejecting, in discussion concerning "point of rest" theory, semantic distinctions excluding from coverage worker "whose entire function is associated with the movement of goods within the terminal").

[24] The Supreme Court of Virginia's continued reliance on *Weyerhaeuser Co.* v. *Gilmore* is misplaced. The Ninth Circuit has made it clear that it reads *Weyerhaeuser's* "realistically significant relationship" language to mean that "repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' covered by the Act." *Sea-Land Service, Inc.*, 685 F.2d at 1123. Thus, the Ninth Circuit applies its *Weyerhaeuser* formulation in harmony with authority in the other federal circuits.

[25] But for the union contracts that prohibited them from placing the trash coal that they had cleared away back on the conveyor belts, Schwalb and McGlone indubitably would have done so.

that respondent Goode was not an employee under the Act, although Goode's duties consisted largely of maintenance and repair of machinery and equipment used exclusively for coal loading in a terminal where loading apparently is almost entirely automated (see J.A. 35).[26]

The Supreme Court of Virginia's apparent conclusion that *Northeast Marine Terminal* and *Pfeiffer* established the outer limits of coverage is inappropriate. As this Court

---

[26] Goode makes an unpersuasive argument that the state court's exclusion of him from LHWCA coverage is not at odds with the overwhelming weight of federal case law because, until the "unloading process had been completed, the coal was still in land transportation and was not in the process of being loaded aboard a ship." 88-127 Br. in Opp. 20-21. The circuit court specifically found that "the process of loading the coal into vessels begins" once the rail cars leave the barney yard (J.A. 35), and Goode has not even suggested that this finding should be set aside. Additionally, although the decision of the Fourth Circuit in *Conti* v. *Norfolk & W. Ry.*, 566 F.2d 890 (1977) (brakemen injured at Lambert's Point were not employees under the LHWCA) supports Goode's argument, we agree with the observation of the Court of Appeals for the District of Columbia Circuit that the Fourth Circuit has "moved away from using the distinction between 'traditional railroading tasks' and 'traditional maritime tasks' as the sole inquiry, or the dispositive issue in LHWCA cases." *Harmon*, 741 F.2d at 1404 (citing *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1050 (4th Cir. 1980) (*Conti* cited only for "integral part" language); *Price, supra* (drawing no *Conti*-like distinction between "traditional railroading" as opposed to "traditional maritime" tasks), and *Vogelsang* v. *Western Maryland Ry.*, 670 F.2d 1347, 1348 (4th Cir. 1982) (distinguishing *Conti*)). This and other courts have, of course, found railroad workers covered by the LHWCA despite the parallel coverage of the FELA. See, *e.g.*, *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334 (1953); *Harmon, supra*; *Vogelsang, supra*; *Price, supra*; cf. *Powell* v. *Cargill, Inc.*, 444 U.S. 987 (1979) (vacating and remanding for reconsideration in light of *Pfeiffer, supra*, lower court's exclusion from coverage of employee whose "work was more oriented to the rails than to the sea" (573 F.2d 561, 564 (1978), withdrawn after remand, 625 F.2d 330 (9th Cir. 1980)). In such circumstances LHWCA coverage is exclusive under 33 U.S.C. 905.

has noted, the claimants in those cases were " 'engaged in longshoring operations,' " and the Court "had no occasion * * * to determine other possible applications of the status test to activities performed on the expanded landward situs." *Perini*, 459 U.S. at 318 n.27. Thus, the Virginia court read the "essential elements" and "overall processes" language in *Northeast Marine Terminal* and *Pfeiffer* in far too cramped a manner (J.A. 25-26), giving no effect to the directive in those cases that the Act's coverage be viewed expansively, and making no accommodation for the impact of modern technology on cargo handling techniques, for the high degree of job specialization, or for the extent of unionization within the longshore industry.[27]

Nor is the line drawn by the Virginia court rendered more palatable by the fact that it may, in some circumstances, relegate employees to a tort, rather than a state workers' compensation remedy. Congress deliberately chose to extend federal workers' compensation because of the advantages specific to that system. See note 10, *supra*; S. Rep. No. 1125, *supra*, at 2 (noting necessity for compensation system to ensure employer responsibility for unsafe conditions in high-risk industry, and consistency of 1972 amendments with recommendations by National Commission on State Workmen's Compensation); H.R. Rep. No. 1441, *supra*, at 2-3 (similar); see also *Nogueira*,

---

[27] To the extent that the state court relied on *Herb's Welding, Inc.* v. *Gray, supra*, its reliance is misplaced. See J.A. 26. The employment at issue in that case—off-shore drilling—was not maritime, and the claimant, a welder on an oil rig, had "nothing to do with the loading or unloading process" and was not "even employed in the maintenance of equipment used in such tasks." 470 U.S. at 425. By contrast, petitioners' terminal operations are uncontestably maritime in nature, and the respondents plainly were "employed in the maintenance of equipment used to [load and unload cargo]."

281 U.S. at 136 (Congress that enacted LHWCA "distinctly recognized" the importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer"); *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334, 337 (1953) (LHWCA chosen as compensation act instead of employers' liability statute so as to bring admiralty law into harmony "with modern concepts of the duty of an employer although without fault to carry the burden of industrial accidents").[20]

---

[20] The advantages offered by a workers' compensation system, as opposed to a system of tort liability such as the FELA, have repeatedly been recognized by this Court and by others. See, *e.g.*, *Parker* v. *Motor Boat Sales*, 314 U.S. 244, 249 (1941) (discussing congressional purpose to extend "modern principle of compensation" by enacting LHWCA) (quoting S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926)); *Urie* v. *Thompson*, 337 U.S. 163, 196-197 (1949) (Frankfurter, J., concurring in part) (describing concept of negligence as "antiquated and uncivilized basis for working out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry"); *Wilkerson* v. *McCarthy*, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring) (describing concept of negligence in FELA cases as an "outmoded * * * working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry," and as a "cruel and wasteful mode" of dealing with injuries that has "long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws"); cf. *Calbeck*, 370 U.S. at 121-122 (noting, while reviewing disadvantages of jurisdictional confusion in LHWCA cases, that Act's framers meant "to assure the existence of a compensation remedy for every * * * injury, without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out [results] in litigation").

Larson notes in his treatise that the FELA, while considered a great step forward as a method of handling work injuries in 1908, had, by 1912, already begun to receive unfavorable comparison with non-fault compensation acts beginning to appear in the States. See 4 A. Larson,

---

C. The Department Of Labor's View On The Scope of LHWCA Coverage Is Entitled To Deference

The Supreme Court of Virginia's restrictive construction of landward coverage under the LHWCA also conflicts with the expansive interpretation of the Section 2(3) status requirement that the Department of Labor has consistently applied since 1972 in administering the LHWCA workers' compensation program. Under the Department's interpretation, respondents would be considered employees under Section 2(3) because their work was directly related to the equipment used to load cargo. See Office of Workers' Compensation Programs, Employment Standards Admin., U.S. Dep't of Labor, *LHWCA Program Memorandum No. 58, Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act* 8-9 (Aug. 10, 1977) ("Longshoring operations may be regarded as all operations necessary to the transfer of cargo between land and water modes of transportation which are performed by workers associated with that transfer rather than with the transportation itself. The test is essentially quite simple: was the injured worker employed in the waterfront cargo-handling industry, in work directly related to the cargo or to the equipment or premises used to handle it? If so, the worker had 'employee' status under § 2(3)."); *Northeast Marine Terminal*, 432 U.S. at 272 (Director's view is that " '[m]aritime

---

supra, § 91.74, at 16-481; see also *id.* at § 91.76 (observing that the debate about the continued vitality of the FELA generally assumes that the negligence principle is an "anachronism" in the handling of workplace injuries, but continues because of failure of non-fault systems to meet objectives); *Report on Comp. Laws* 25, 45, 119-120 (criticizing tort liability suits as method of workers' compensation because determination of negligence by litigation expensive, leaves some workers without protection for injury, crowds court dockets, delays payment, and may deter successful rehabilitation).

employment * * * include[s] all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation' ").

The Department's interpretation of the Section 2(3) status requirement is "based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Thus, it is entitled to deference and should be given effect.[29]

CONCLUSION

The judgments of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
DAVID L. SHAPIRO
Deputy Solicitor General
CHRISTINE DESAN HUSSON
Assistant to the Solicitor General

JERRY G. THORN
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
CHARLES I. HADDEN
Deputy Associate Solicitor
CHRISTINE L. OWENS
Attorney
Department of Labor

APRIL 1989

---

[29] See, *e.g.*, *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 635 (1983) (consistent practice of those charged with enforcement and interpretation of LHWCA entitled to deference); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978) (great deference due interpretation of officers or agency administering statute); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969) (construction of statute by those charged with executing it should be followed "unless there are compelling indications that it is wrong").

☆ U.S. GOVERNMENT PRINTING OFFICE 1989 -241-699/00220

AMICUS CURIAE

BRIEF

MOTION FILED
APR 21 [illegible]

(6) (5)

Nos. 87-1979 and 88-127

In The

Supreme Court of the United States

October Term, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

On Writs of *Certiorari*
To The Supreme Court of Virginia

MOTION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

STEPHEN A. TRIMBLE*
JOHN M. CLIFFORD
JOHN J. DELANEY
Hamilton and Hamilton
Suite 201- E
1300 New York Avenue, N.W.
Washington, D.C. 20005
(202) 898-1300

Attorneys for Amici Curiae

**Counsel of Record*

April 21, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

In The

Supreme Court of the United States

October Term, 1988

Nos. 87-1979 and 88-127

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

MOTION OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Association of American Railroads and the National Association of Railroad Trial Counsel respectfully move for leave to file the attached *amici curiae* brief in these consolidated cases. Petitioner and respondents in No. 87-1979 have consented to the filing of this brief. Petitioner in No. 88-127 has likewise consented to its filing, but respondent therein indicated only that he will have no objection to this motion.

The decision of the Virginia Supreme Court below, in cases brought under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, reversed judgments of the state trial courts, which had dismissed the cases on the basis that their claims were subject to the exclusive jurisdiction of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*), since respondents' duties involved maintenance and repair of structures and machinery utilized in loading bulk coal onto ships in navigable waters. As previously developed herein in the petitions for writs of *certiorari*, as well as the *amici curiae* briefs filed by these movants and the Solicitor General on behalf of the United States (which was filed at the request of this Court), the decision below is in direct conflict with the decisions of all six federal circuits which have considered the question, including the Fourth Circuit.

Mindful of considerations of nationwide uniformity as to the coverage of the LHWCA, as well as issues of federal supremacy (due to the fact that different results ensue, depending on whether a case is filed in state or federal court), these *amici curiae* submit that such coverage questions are susceptible to uniform resolution by application of a standard of "collective non-performance" of the particular duties of the injured worker as they relate to the ship-loading/unloading process. Such an approach was successfully utilized by this Court in resolving similar coverage questions which arose under the 1939 Amendments to the FELA, which expanded that Act's coverage for reasons much like those which prompted the expansion of coverage in the 1972 Amendments to the LHWCA.

The members of the Association of American Railroads constitute the vast majority of the nation's railroads which are sued under the FELA or the LHWCA, and have a direct interest in maintaining nationwide uniformity in decisions as to the scope of the exclusive coverage of the LHWCA, in order to properly determine under which of the Acts their injured employees must make claims for work-related injuries. The Members of the National Association of Railroad Trial Counsel, who are attorneys representing the various railroads, have a direct interest in the substantive law, strategy and tactics in cases brought under either Act, and have a direct interest in nationwide uniformity so as to enable them to adequately advise their railroad clients as to the proper handling of cases, depending upon which of the Acts is involved.[1]

Quite properly, the petitions herein were limited to arguing the propriety of the decision below, and did not undertake to develop a basis for the resolution of future cases which will involve other facts, or will involve future technological advances in ship-loading. These *amici curiae* believe the "collective non-performance" standard advanced in the attached Brief will be of assistance to the Court, not only in its resolution of the issues in these consolidated cases, but in developing a simple, objective and uniform standard of coverage of the LHWCA.

---

[1] The marked disparity in procedures under the two Acts is discussed in Section III of the Brief Of Association Of American Railroads and National Association Of Railroad Trial Counsel As *Amici Curiae* In Support Of Petition in No. 87-1979, filed July 5, 1988.

Accordingly, the Association of American Railroads and National Association of Railroad Trial Counsel respectfully request leave to present their views herein.

Respectfully submitted,

STEPHEN A. TRIMBLE*
JOHN M. CLIFFORD
JOHN J. DELANEY
Hamilton and Hamilton
Suite 201- E
1300 New York Avenue, N.W.
Washington, D.C. 20005
(202) 898-1300

Attorneys for Amici Curiae
Association of American Railroads
and National Association of
Railroad Trial Counsel

**Counsel of Record*

April 21, 1989

QUESTION PRESENTED

Whether, in determining if a worker qualifies as an "employee" engaged in maritime employment within the meaning of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, the congressional intent for a "simple uniform standard of coverage" under the Act would be best achieved by an analysis as to whether the collective non-performance of his duties would slow, stop, or lessen the safety or efficiency of the ship-loading/unloading process?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ... i

TABLE OF AUTHORITIES ... iii

STATEMENT OF INTEREST OF *AMICI CURIAE* ... 1

STATEMENT OF THE CASE ... 3

SUMMARY OF ARGUMENT ... 3

ARGUMENT:

I. The Approaches Utilized In The Federal LHWCA Decisions, Rejected By The Court Below, Are Consistent With The Act And Are Similar To The Approach Utilized By This Court In Connection With The Expanded Coverage Of The FELA ... 4

- A. LHWCA Coverage Was Expanded For Reasons Similar To Those Which Prompted Expansion Of FELA Coverage ... 6
- B. The Collective Non-Performance Standard Used In Determining FELA Coverage Is Readily Adaptable To The LHWCA ... 9

II. The Suggested Standard Would Resolve The Intolerable Conflict Created Below And Would Accommodate Changes Occasioned By Ongoing Technological Advances ... 12

CONCLUSION ... 18

TABLE OF AUTHORITIES

Page

CASES:

Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977) ... 5

Felder v. Casey, 486 U.S. ___, 108 S.Ct. 2302 (1988) ... 12,13

Garvey Grain Co. v. Director, Office of Workers' Compensation Programs, 639 F.2d 366 (7th Cir. 1981) ... 5,14

Graziano v. General Dynamics Corp., 663 F.2d 340 (1st Cir. 1981) ... 5,14

Harmon v. Baltimore & O. R.R., 741 F.2d 1398 (D.C. Cir. 1984) ... 5,14

Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985) ... 13

Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) ... 5,14

Nogueira v. New York, N.H. & H. R. Co., 281 U.S. 128 (1930) ... 3

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) ... *passim*

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979) . 3,10,11,12

Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334, *reh. denied*, 345 U.S. 913 (1953) ... 3

Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980) ... 5,12,14

Prolerized New England Co. v. Miller, 691 F.2d 45 (1st Cir. 1982) ... 5

Reed v. Pennsylvania R. Co., 351 U.S. 502 (1956) ... 8,9,10,16

Sanders v. Alabama Dry Dock & Shipbuilding Co., 841 F.2d 1085 (11th Cir. 1988) ... 6,14

Table of Authorities Continued

Page

Schwalb v. C. & O. Ry. Co., 365 S.E.2d 742 (Va. 1988) 3,4,12,13

Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs, 685 F.2d 1121 (9th Cir. 1982) 5,13,14

Southern Pacific Co. v. Gileo, 351 U.S. 493 (1956) 8,9,10

Weyerhaeuser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976) . 13

STATUTES:

United States Code:

Federal Employers' Liability Act:

45 U.S.C. § 51, *et seq.* .... *passim*

45 U.S.C. § 51 (originally enacted as Act of April 22, 1908, ch. 149, § 1, 35 Stat. 65) 7,8

45 U.S.C. § 51 (as amended by Act of August 11, 1939, ch. 685, § 1, 53 Stat. 1404) 7,8

Longshore and Harbor Workers' Compensation Act:

33 U.S.C.§ 901, *et seq.* .... *passim*

33 U.S.C. § 902 (3) 7,14,16

33 U.S.C. § 903 (a) 3,7

33 U.S.C. § 905 3

Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 2 (a), 98 Stat. 1639 (codified as amended at 33 U.S.C. § 902 (3)) 13,16

MISCELLANEOUS:

H.R. Rep. No. 570, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, *et seq.* 14,17

Table of Authorities Continued

Page

Webster's New World Dictionary 732 (2d College ed. 1986) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1979 and 88-127

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
v.
NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,
v.
ROBERT T. GOODE, JR.,
Respondent.

On Writs of *Certiorari*
To The Supreme Court of Virginia

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

The Association of American Railroads is a voluntary, unincorporated, non-profit trade organization, headquartered in Washington, D.C. Its members constitute the vast majority of the nation's railroads. They operate approximately 85 percent of the line-haul mileage, produce approximately 93 percent of the freight revenues and employ approximately 90 percent of the railway work force in the United States, having in the aggregate nearly 250,000 employees who, if injured, are subject to the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (hereinafter "FELA"), unless their injuries are compensable under the Federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter "LHWCA"). The interest of the Association is to maintain nationwide uniformity in the determination as to which Act applies to those railroad employees injured while performing duties in connection with the loading and unloading of vessels.

The National Association of Railroad Trial Counsel is a voluntary, unincorporated non-profit organization, headquartered in Los Angeles, California. Its membership consists of more than 1,200 trial lawyers who represent all of the significant railroads operating throughout the United States. One of its principal objectives is to furnish railroad counsel with a forum for the study of legal problems associated with railroad personal injury cases, including those filed by employees under the FELA and the LHWCA, with particular interest in the substantive law and the strategy and tactics to be utilized therein. Another of its objectives is to enable its members to advise their railroad clients as to the proper handling of such injury cases depending upon which of the Acts is involved.

STATEMENT OF THE CASE

In these consolidated cases, the decision of the Virginia Supreme Court below in No. 87-1979 has been subsequently reported at 235 Va. 27, 365 S.E.2d 742 (1988). In No. 88-127, the Virginia court below later entered judgment based on the above decision. This brief, for ease of reference, will refer to the cases collectively as the decision below.

SUMMARY OF ARGUMENT

Notwithstanding the fact that the FELA expressly covers all claims by interstate railroad employees for work-related injury, if a claim is cognizable under the LHWCA, it *must* be filed under that later-enacted statute since that Act's coverage is "exclusive."[1]

The decision below by Virginia's highest court concerning the LHWCA's "status" requirement[2] is in obvious conflict with all of the many federal circuit decisions, thus defeating the congressional intent that "a simple, uniform standard of coverage" be applied.[3] This conflict is due to Virginia's view that longshore "status" can be achieved only if the employee actually is "engaged in the handling of cargo", notwithstanding its recognition that respondents' failure to perform their duties would interrupt the ship-loading process.[4] The federal decisions, on the other hand, while using slightly different analyses, hold that the "status" requirement is satisfied where the employee's duties constitute a necessary or integral part of the loading process.

---

[1] 33 U.S.C. § 905; *see Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, *reh. denied*, 345 U.S. 913 (1953); *Nogueira v. New York, N.H. & H. R. Co.*, 281 U.S. 128 (1930).

[2] Congress expanded the coverage of the LHWCA in 1972 through the adoption of a "situs-status" approach, as extensively discussed in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). The decision below recognizes that the "situs" requirement has been met, as it is clear that mechanized coal loading facilities of the type involved herein constitute a part of an "adjoining pier, wharf, . . . or other adjoining area customarily used . . . in loading . . . a vessel." 33 U.S.C. § 903 (a).

[3] *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 83 (1979).

Amici curiae believe that this conflict can be resolved by adoption of a "collective non-performance" standard to determine whether the LHWCA's "status" requirement is met in individual cases: if nonperformance of the work allocated to the employee and all others having the same duties would stop, slow, or lessen the safety or efficiency of the ship-loading/unloading process, the worker would be deemed an "employee" engaged in "maritime employment." This Court successfully utilized a similar standard in resolving coverage questions under the 1939 Amendments to the FELA, the coverage of which was expanded for much the same reasons which prompted the expansion of coverage accomplished by the 1972 Amendments to the LHWCA.

ARGUMENT

I. THE APPROACHES UTILIZED IN THE FEDERAL LHWCA DECISIONS, REJECTED BY THE COURT BELOW, ARE CONSISTENT WITH THE ACT AND ARE SIMILAR TO THE APPROACH UTILIZED BY THIS COURT IN CONNECTION WITH THE EXPANDED COVERAGE OF THE FELA

This Court has discussed the broad language of the 1972 LHWCA Amendments and accorded "an expan-

---

[4] *Schwalb v. C. & O. Ry. Co.*, 365 S.E.2d 742, 743 (Va. 1988).

sive view of the extended coverage" thereof. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. at 268. The various federal circuits, in line with this Court's liberal construction of the "status" requirement of the LHWCA, hold that workers who maintain or repair equipment necessary in ship-loading/unloading are within its coverage. Those decisions are based on the premise that such maintenance or repairs are either "an integral part of,"[5] "vital to,"[6] "essential to,"[7] or "essential and indispensable"[8] to the progressively mechanized process of ship-loading/unloading occasioned by modern technology.

In similar fashion, the federal circuits have addressed the related question of LHWCA coverage of different types of work done in shipbuilding and repair yards, finding coverage when a particular job was either "essential to . . . and was a necessary link in,"[9] "necessary to,"[10] or "significantly related to and directly furthered"[11] the employer's shipbuilding and ship repair functions.

---

[5] *Prolerized New England Co. v. Miller*, 691 F.2d 45, 47 (1st Cir. 1982); *Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121, 1123 (9th Cir. 1982).

[6] *Harmon v. Baltimore & O. R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984); *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 370 (7th Cir. 1981).

[7] *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059, 1061 (4th Cir. 1980).

[8] *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 755-56 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

[9] *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 343 (1st Cir. 1981).

[10] *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977).

Amici curiae submit that the approaches taken by those federal decisions, and not the Virginia approach, correctly resolve the inquiry into the scope of coverage of the LHWCA, as amended. Their holdings generally comport with *Northeast Marine Terminal's* finding of coverage for a cargo checker whose work, although not involving actual handling of cargo, was nevertheless "an integral part of the unloading process as altered by the advent of containerization,"[12] whereas Virginia's approach (which turns on whether the employee was "actually engaged in the handling of cargo") does not. Moreover, their holdings are generally in accord with the "collective non-performance" standard utilized by this Court to determine similar coverage questions under the 1939 Amendments to the FELA, which has proved successful because it is a simple, direct, objective and common-sense test which achieves uniformity in application over a broad spectrum of jobs.

A. LHWCA COVERAGE WAS EXPANDED FOR REASONS SIMILAR TO THOSE WHICH PROMPTED EXPANSION OF FELA COVERAGE

As cogently discussed in *Northeast Marine Terminal*, LHWCA coverage initially was limited to "navigable waters", leaving those injured landward of the so-called "Jensen line" to state compensation remedies. Thus, LHWCA coverage sometimes depended

---

[11] *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 1088 (11th Cir. 1988).

[12] 432 U.S. at 271.

upon fortuitous and hypertechnical circumstances, such as whether the worker's body had been hurled into the water or remained on land,[13] or the location and status of the cargo at the time of injury (the so-called "point of rest" theory).[14] Congress enacted the 1972 Amendments to the LHWCA to meet the changes occasioned by modern technology, as well as to provide equal treatment to all workers engaged in the same job of ship-loading/unloading by moving the "Jensen line" landward.[15] By looking also to the duties of the employee, Congress obliterated the "point of rest" theory.[16] The 1972 Amendments based LHWCA coverage upon a dual "situs-status" test—by expanding the definition of "navigable waters" in 33 U.S.C. § 903 (a) to include adjoining piers, wharfs, terminals or other adjoining areas customarily used in ship-loading/unloading, and by broadening the definition of "employee" in 33 U.S.C. § 902 (3) to include anyone engaged in maritime employment, including longshoremen and harbor workers, subject to certain narrow express exceptions.[17]

Some thirty-two years previously, the Congress had expanded the FELA's coverage based upon much the same considerations. Prior to the 1939 Amendment to 45 U.S.C. § 51, the FELA provided that a "railroad, while engaged in commerce" between the states, "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."[18] Litigation developed hypertechnicalities, such as the "moment of injury" and "new construction" doctrines, which resulted in some workers being allowed to proceed under the FELA, while others doing like work were left with state remedies. The 1939 Amendment to the FELA expanded its coverage to embrace those whose duties included the "furtherance of interstate or foreign commerce," or whose duties "in any way directly or closely and substantially affect such commerce."[19] In companion decisions, this Court found the purpose of the 1939 Amendment was "to obliterate fine distinctions as to coverage between employees who, for the purpose of this remedial legislation, should be treated alike,"[20] and to "cure the evils of hypertechnical distinctions which had developed in over 30 years of FELA litigation."[21]

---

[13] *Northeast Marine Terminal*, 432 U.S. at 259.

[14] *Id.* at 274-75.

[15] *Id.* at 263.

[16] *Id.* at 277-79.

[17] *Id.* at 263-66.

Unquestionably, the 1939 Amendment to the FELA evinced a congressional purpose "to expand [that Act's] coverage substantially." *Reed v. Pennsylvania R. Co.*, 351 U.S. at 506. A similar "expanded view of coverage" to be afforded under the 1972 Amendments to the LHWCA was recognized in *Northeast Marine Terminal*, 432 U.S. at 268. In essence, the underlying reason for amending both statutes was to negate the hypertechnicalities which produced different results for employees doing similar work. To accomplish this, the amendments to both statutes focused upon the employee's *duties* in relation to the statutory criteria: whether the duties further or closely and directly affect interstate commerce under the FELA;[22] and whether they constitute "maritime employment" as a longshoreman or harbor worker so as to satisfy the "status" requirement under the LHWCA.[23]

---

[18] 45 U.S.C. § 51 (originally enacted as Act of April 22, 1908, ch. 149, § 1, 35 Stat. 65).

[19] 45 U.S.C. § 51 (as amended by Act of August 11, 1939, ch. 685, § 1, 53 Stat. 104).

[20] *Reed v. Pennsylvania R. Co.*, 351 U.S. 502, 505 (1956).

[21] *Southern Pacific Co. v. Gileo*, 351 U.S. 493, 499 (1956).

As will be discussed below, the collective non-performance standard utilized by this Court in determining coverage questions under the 1939 Amendment to the FELA is remarkably similar to that utilized in the federal decisions in making the analogous determination under the LHWCA.

B. THE COLLECTIVE NON-PERFORMANCE STANDARD USED IN DETERMINING FELA COVERAGE IS READILY ADAPTABLE TO THE LHWCA

Because the determination of the question of "status" under the LHWCA requires an analysis of job duties as they relate to the statutory criteria of "maritime employment," the analysis utilized by this Court in making the analogous determination of coverage questions under the FELA's statutory criteria is readily adaptable thereto.

The standard by which specific coverage questions were resolved under the 1939 Amendments to the FELA was developed in the companion cases of *Gileo* and *Reed*. In *Gileo*, the Court approached the question by utilizing a collective non-performance analysis. The

---

[22] *Id.* at 499.

[23] *Northeast Marine Terminal*, 432 U.S. at 264.

Court analyzed the issue as to whether "[f]ailure to perform their duties would preclude delivery to the railroad of cars . . . essential to its transportation needs" or "substantially impede the carrier's performance" in the case of one of the workers.[24] With respect to another worker, the Court reasoned that "since wheels which wear out cannot be repaired, they must be recast . . . . The operation itself is a vital link in the chain . . . ."[25] Similarly, in *Reed*, the Court analyzed the necessity of the work in question, not focusing on the individual employee, but instead assessing the effects of non-performance by all employees engaged in the same work: "[i]f all employees who perform petitioner's duties were removed from service, respondent could not conduct its operations without a change in its organizational system."[26]

While this Court has not promulgated a specific standard by which to determine "status" under the 1972 Amendments to the LHWCA, it has nevertheless indicated the basis for such a standard when it found coverage for one performing "an integral part" of the ship-loading/unloading process,[27] as well as another finding of coverage for a worker "responsible for some portion of that activity."[28] Those findings,

---

[24] *Southern Pacific Co. v. Gileo*, 351 U.S. at 499.

[25] *Id.* at 500.

[26] 351 U.S. at 506-07.

[27] *Northeast Marine Terminal*, 432 U.S. at 271. The word "integral" is defined as "necessary for completeness; essential . . ." or "whole or complete" or "made up of parts forming a whole." Webster's New World Dictionary, 732 (2d College ed. 1986).

[28] "A worker responsible for some portion of that [longshoring]

coupled with this Court's recognition therein that Congress intended a "simple, uniform standard of coverage" commend the simple, direct and commonsense approach used in adjudicating FELA coverage questions.

For example, in the cases at bar, the work of clearing spilled coal by respondents Schwalb and McGlone, if not done, would soon result in an interruption to the loading process. Similarly, the retarder repairs being done by respondent Goode, if not performed, would result in an interruption to the loading process, as the coal cars must be properly stopped and positioned prior to their being lifted and rotated so as to drop the coal through the hopper and onto the conveyor belts. By application of the collective nonperformance standard, the vital nature of their duties to the loading process becomes readily apparent.

Thus, *amici curiae* submit that the FELA's collective non-performance standard is readily adaptable to determine "status" questions under the LHWCA. The test is simple in application: whether non-performance of the duties of the employee and others doing the same work would result in the ship-loading/unloading process being impeded, stopped, or rendered less safe or efficient. If so, such work *a fortiori* would constitute a "vital link in the chain" or an "integral" and "indispensable" part of "longshoring" or "harborworking," and thus satisfy the "status" requirement adopted in the 1972 Amendments to the LHWCA.

---

activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *P. C. Pfeiffer Co. v. Ford*, 444 U.S. at 82-83.

II. THE SUGGESTED STANDARD WOULD RESOLVE THE INTOLERABLE CONFLICT CREATED BELOW AND WOULD ACCOMMODATE CHANGES OCCASIONED BY ONGOING TECHNOLOGICAL ADVANCES

The decision below, by failing to accord Longshore status to employees whose work is necessary to the continued functioning of ship-loading equipment, is in direct conflict with the decisions of six federal circuits which have considered the question.[29] Whether viewed in the context of defeating the congressional intent for LHWCA uniformity recognized in *Pfeiffer*, or in the broader context of violating the principles underlying federal supremacy,[30] the conflict is intolerable under federal law.

The wisdom of the doctrines of uniformity and federal supremacy is clearly demonstrated where, as here, a state court deliberately chooses to put itself in conflict with its federal circuit court. Indeed, in refusing to apply the holding in *Price v. Norfolk & Western Ry. Co.*, the Virginia court candidly stated:

> The *Price* court reasoned that, because "the failure to paint would eventually lead to severe rusting that would halt the entire [loading] process" [citation omitted] the plaintiff was engaged in maritime employment and, consequently, "was an 'employee' within the meaning of the LHWCA which provides an exclusive remedy." [citation omitted.]
>
> *We cannot agree that Congress intended the 1972 amendments to have such pervasive and preclusive effects.*

---

[29] *See* fns. 5-8, *supra*.

[30] The Supremacy Clause "imposes upon state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' [Citation omitted.]" *Felder v. Casey*, 486 U.S. ____, 108 S.Ct. 2302, 2313 (1988).

365 S.E.2d at 744 (emphasis added). As a result, an injured employee will have different rights and remedies, depending solely upon whether his case is filed in a federal or a state court in Virginia—the very evil sought to be avoided under the LHWCA's concept of uniformity, and under the concept of federal supremacy. *Felder v. Casey*, 108 S.Ct. at 2313.

Not only is Virginia's view in direct conflict with the Fourth Circuit,[31] it stands alone in stark contrast with this Court's observation in *Northeast Marine Terminal* that the "language of the 1972 Amendments is broad and suggests . . . an expanded view of its coverage,"[32] occasioned by "the advent of modern cargo-handling techniques."[33] Moreover, the Virginia view is belied by the 1984 LHWCA Amendments,[34] as to which Congress made clear that even non-cargo handling clerical workers were covered when some of their duties involve working in areas in which cargo is handled.[35]

---

[31] Virginia's view is premised upon an obvious misapplication of this Court's decision in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) and the Ninth Circuit's decision in *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976). In those cases, the workers were injured in areas not covered by the LHWCA, and the duties of each had no relation whatever to the ship-loading process. Moreover, the Virginia court totally ignored a post-*Weyerhaeuser* Ninth Circuit decision holding coverage for a worker whose duties involved repairing container cargo equipment. *Sea-Land Services, Inc. v. Director, Etc.*, 685 F.2d 1121.

[32] 432 U.S. at 268.

[33] *Id.* at 269.

[34] Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 2 (a), 98 Stat. 1639 (codified as amended at 33 U.S.C. § 902 (3)).

We believe, however, that the collective non-performance standard discussed in Section I, *supra*, if adopted, would eliminate conflicts of the type involved here, by providing a simple, objective, practical and uniform test by which to determine questions of LHWCA "status" occasioned by on-going developments in technology.[36] The very simplicity of the standard allows the highest degree of flexibility in application, whether in resolving present questions (such as those occasioned by differences in union

---

[35] "Workers . . . may be deemed to be engaged . . . in 'clerical type work', but [when] that work is done in the areas in which cargo is handled, not exclusively in a business office . . . the checker or clerk would remain within Longshore Act jurisdiction." H.R. Rep. No. 570, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, 2737.

[36] In the federal decisions, the First and Fourth Circuits have resolved the "status" question by the express utilization of a non-performance analysis. *See Graziano v. General Dynamics Corp.*, 663 F.2d at 343; *Price v. Norfolk & Western Ry. Co.*, 618 F.2d at 1062. Although not utilized *eo nomine*, a non-performance concept is subsumed in the Seventh and D. C. Circuit analyses that the work was "vital" (*Harmon v. Baltimore & O. R.R.*, 741 F.2d at 1404; *Garvey Grain Company v. Director, Etc.*, 639 F.2d at 370), as well as in the Fifth Circuit's analysis that the work was "essential and indispensable" (*Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d at 756). By contrast, the decisions of the Ninth and Eleventh Circuits involve a different approach, whereby they assess the nature of the maritime work of the employer, and consider whether the employee's duties are "integral" thereto, or "directly further" the same. *See Sea-Land Services, Inc. v. Director, Etc.*, 685 F.2d at 1124; *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d at 1088.

agreements, job descriptions, work rules, or methodology used in connection with the ship-loading/unloading process, which may differ from port-to-port, or from employer-to-employer or pier-to-pier in the same port), or in resolving future questions occasioned by technological advances which are presently unknown.

The startling gains in productivity achieved by technology were referred to in *Northeast Marine Terminal*.[37] Of course, economies of time and effort are not possible without the heavy-capacity machinery of different types required for the infinite varieties of cargo transported over the waters. While such machinery may replace a number of workers doing manual loading, yet other types of workers are needed to perform the preventive maintenance necessary for its continued and efficient operation, as well as the repairs necessary to restore it to service following a malfunction. Absent their work, modern ship-loading would halt.

Whatever the particular technology which may be involved (*e.g.*, that utilized in containerization of traditional cargo, rapid open or closed loading of bulk commodities, or safe loading of combustible fuels and gasses), the same principle applies—the speed, efficiency, and safety for which the technology was developed is defeated if the equipment is not maintained in a continuing state of good repair. Although the details of future technology are, of course, unpredictable, there is nothing which suggests there will be any change in the principle underlying the requirement that equipment be kept in a continuing state of good maintenance and repair. Whatever particular facts exist, or in the future may exist with respect to a given job and its relationship to the technology utilized in the shiploading process, the collective non-performance standard will provide a simple test by which to achieve uniformity in determinations as to whether various types of workers satisfy the LHWCA's "status" requirement.

---

[37] The Court cited a study which showed that 42 men working a total of 546 man-hours could accomplish with containerization the same work done by 126 men working a total of 10,584 man-hours utilizing conventional methods. 432 U.S. at 270 n.31.

Moreover, the 1984 LHWCA Amendments ensure that the collective non-performance standard would not be applied beyond the limits intended by Congress. First, those amendments did nothing to lessen the requirement that "situs" be satisfied. Second, as regards "status", the Congress further defined the term "employee" so as *not to include* certain individuals, such as those "employed exclusively to perform office clerical, secretarial, security, or data processing work,"[38] thus establishing the outer limits of "status."[39] Even as to these outer limits the legislative history is clear that the Congress intended them to be literally construed:

> The Committee intends that this exclusion be read very narrowly. First, the Committee intends that the word "exclusively" modify all four classifications of work presented. . . . The Committee firmly believes that the situation in which a worker may be covered at one time, and not covered at another, depending on the nature of the work which the worker is performing at the time of injury must be avoided since such a result would be enormously destabilizing, and would thus defeat one of the essential purposes of these amendments.
>
> Second, the Committee intends that the word "office" modify the word "clerical". Not all clerical work is intended to be excluded—merely that which is performed exclusively in a business office of the employing enterprise. Workers who may be classified as clerks or cargo checkers for example may be deemed to be engaged, at times, in "clerical" type work, but that work is done in the areas in which cargo is handled, not exclusively in a business office of the stevedore. In such circumstances, the checker or clerk would remain within Longshore Act jurisdiction.

H.R. Rep. No. 570, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, 2736-37. Hence, with a clear declaration as to the outer limits of LHWCA coverage by the Congress, there is no danger that a collective non-performance standard to determine "status" would reach too far. Moreover, adoption of this standard would achieve that which this Court recognized was intended by the Congress in enacting the 1972 Amendments to the LHWCA: a "simple, uniform standard of coverage."

---

[38] Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 2(a), 98 Stat. 1639 (codified as amended at 33 U.S.C. § 902 (3)).

[39] This provision, for example, would preclude LHWCA "status" for an office clerical worker such as the tracing file clerk involved in *Reed v. Pennsylvania R. Co.*, 351 U.S. 502, unless that job required the employee to perform a part of the work (*e.g.*, delivery of the requested tracings to the loading superintendent) in the area where cargo is handled, in which case the worker would qualify for LHWCA "status."

CONCLUSION

On the basis of the foregoing, *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel respectfully submit that the judgments of the Supreme Court of Virginia should be reversed, with directions to dismiss the complaints.

Respectfully submitted,

STEPHEN A. TRIMBLE*
JOHN M. CLIFFORD
JOHN J. DELANEY
Hamilton and Hamilton
Suite 201- E
1300 New York Avenue, N.W.
Washington, D.C. 20005
(202) 898-1300

Attorneys for Amici Curiae
Association of American Railroads
and National Association of
Railroad Trial Counsel

**Counsel of Record*

April 21, 1989